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Empire, Trade, and the Use of Agents in the 19th Century: The “Reception” of the Undisclosed Principal Rule in Louisiana Law and Scots Law

Laura Macgregor^{*}

TABLE OF CONTENTS

Introduction	986
I. The Nature and Economic Benefits of Undisclosed Agency.....	992
II. The Concept of a “Mixed Legal System” and Agency Law in Mixed Legal System Scholarship	997
III. Nature and Historical Development of Scots Law	1002
A. The Reception of Roman Law	1002
B. The Institutional Period and Union with England	1004
C. The Development of Scots Commercial Law.....	1006
D. When Did Scots Law Become Mixed in Nature?	1008
IV. Undisclosed and Unidentified Agency in English Law	1009
A. The Role of the Factor	1009
B. Expansion and Further Development: Undisclosed Agency	1011
C. Unidentified Agency.....	1012
V. Undisclosed and Unidentified Agency in the United States	1012
VI. Undisclosed and Unidentified Agency in Louisiana Law	1015
A. The Louisiana Digest or Civil Code of 1808.....	1015
B. Trading Conditions in the 19th Century	1018
C. Case Law: The Swing of the Pendulum Between the Civil and the Common Law	1020
D. Revision of the Code, 1997	1024
E. Conclusions.....	1028
VII. Undisclosed and Unidentified Agency in Scots Law	1028
A. Mandate	1029
B. The Role of the Factor and Early Scottish Case Law	1029
C. The 19th Century and the Influence of Bell	1032
D. Modern Scots Law	1034

VIII. Comparative Remarks	1036
Conclusion.....	1040

INTRODUCTION

This Article focuses on a fundamentally important concept in agency law: undisclosed agency. Agency law has profound economic importance. Over a career, an agent develops expert knowledge of markets in a particular geographical area and a range of commercial contacts. This information is highly beneficial to a manufacturer of goods seeking to sell those goods in different markets. When a manufacturer employs and pays an agent, the manufacturer can make use of the agent's expertise and knowledge.¹ Indeed, the manufacturer may select a particular agent because of a desire to "break into" the market in a different geographical area. This division of labor allows the manufacturer to form contracts with third parties in a highly efficient manner.

Interposing an agent between two contracting parties—the principal and the third party—poses challenges for consensual theories of contract. Such theories conceive of contracts as bilateral relationships, emphasizing the requirement for *consensus in idem*, or a meeting of the minds, between actual contracting parties. These theories assume direct, not indirect, negotiations. In a common law system, in situations involving an agent, these challenges may be overcome by adopting an objective approach, treating the agent as the manifestation of the principal's intention.² The principal and third party are able to reach a consensus because the third

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1. Manufacturers are discussed here because the focus of this Article is the sale of goods. A principal in an agency situation could, of course, provide services rather than goods.

2. Gerard McMeel, *Philosophical Foundations of the Law of Agency*, 116 L.Q. REV. 387 (2000).

party treats the agent's words and conduct as the embodiment of the principal's intentions. In a sense, the agent is ignored, allowing theorists to maintain the fiction of direct negotiations.

The approach described above makes sense when the third party is *aware* that she is dealing with an agent and that agent names her principal. The third party can assess the risks inherent in contracting with a particular principal before concluding a contract. What if the agent fails to disclose both that she is an agent and also—necessarily—the identity of her principal? The agent may behave this way because the principal has instructed her to do so: withholding such information can economically benefit the principal, in ways which are explored below.³ The objective approach to formation—which characterized the agent as the manifestation of the principal's consent—cannot assist here. The third party is unaware that the agent even is an agent, and as a result, cannot be deemed to have reached *consensus* with a principal who is unknown to her. This situation—undisclosed agency in a nutshell—is nevertheless legally valid in most, possibly all, common law systems.⁴ It is generally agreed that under English law, a contract is initially formed between an agent and a third party, the third party in ignorance of the existence of a principal.⁵ The principal can later choose to intervene in that contract, suing the third party if that third party has failed to perform. If the third party becomes aware that a principal exists, the third party can also sue the principal. Undisclosed agency conflicts with the rule of privity of contract, providing the principal with rights and duties under a contract formed between two other parties—agent and third party.

“One of the most unusual rules”⁶ in agency law, undisclosed agency is a problem which remains unsolved by theorists. The inconsistency between consensual theories of contract and undisclosed agency is not surprising: “[T]he doctrine [of undisclosed agency] was formed before such theories had acquired prominence.”⁷ Attempts to explain undisclosed agency using recognized concepts such as assignment, third party rights,

3. See *infra* Part I.

4. For English law, see *infra* Part IV. For analysis in other common law systems, see TAN CHENG HAN, *THE LAW OF AGENCY* 294–361 (2d ed. 2017); GERALD H.L. FRIDMAN, *CANADIAN AGENCY LAW* 157–70 (3d ed. 2017); GINO E. DAL PONT, *THE LAW OF AGENCY* ¶¶ 19.28–19.46 (3d ed. 2013).

5. PETER WATTS & FRANCIS M.B. REYNOLDS, *BOWSTEAD AND REYNOLDS ON AGENCY* ¶ 8-069 (21st ed. 2018); RODERICK MUNDAY, *AGENCY: LAW AND PRINCIPLES* ¶ 10.27 (2d ed. 2013).

6. MUNDAY, *supra* note 5, ¶ 10.28.

7. WATTS & REYNOLDS, *supra* note 5, ¶ 8-069.

or the law of trusts, have been unsuccessful.⁸ It has led agency scholars to design a theoretical framework for agency which omits undisclosed agency entirely,⁹ or categorize it as *sui generis* and not part of agency law.¹⁰ Undisclosed agency is usually justified purely by reference to commercial convenience.¹¹

Undisclosed agency is universally treated as a creation of the common law. The approach of T.B. Smith, a leading Scottish scholar writing in the 1960s, is typical: it is a “specialty of English law, which Scots law may well have been right to adopt.”¹² It is “one of the most important differences”¹³ between the civil and the common law traditions. This Article challenges the orthodox view that undisclosed agency is created by common law systems and adopted into other legal systems. It does so by carrying out a historical examination of two so-called “mixed” legal systems: Louisiana law and Scots law. These legal systems have been described as “mixed” because they comprise an inherently civilian basis overlaid by common law influence. The novel suggestion made in this Article is that Louisiana law and Scots law developed undisclosed agency as a commercial necessity *before* the relevant legal precedents from English law or the law of the other states of the United States became available to the courts in the mixed legal systems. This Article casts doubt on the assumption that undisclosed agency is necessarily an invention of the common law.

It is certainly true that undisclosed agency developed from a practical context in England. Indeed, Roderick Munday traced the birth of the

8. See A.L. Goodhart & C.J. Hamson, *Undisclosed Principals in Contract*, 4 C.L.J. 320 (1932).

9. See Thomas Krebs, *Agency Law for Muggles: Why There is no Magic in Agency*, in *CONTRACT FORMATION AND PARTIES* 211–12 (Andrew Burrows & Edwin Peel eds., 2010); McMeel, *supra* note 2, at 387 n.7.

10. This seems to be the more recent view of Krebs who concludes: “[C]onfusion will be reduced by realizing how very distinct disclosed and undisclosed agency are.” Thomas Krebs, *Some Thoughts on Undisclosed Agency*, in *ENGLISH AND EUROPEAN PERSPECTIVES ON CONTRACT AND COMMERCIAL LAW: ESSAYS IN HONOUR OF HUGH BEALE* 161, 181 (Louise Gullifer & Stefan Vogenauer eds., 2014).

11. *Siu Yin Kwan v. E. Ins. Co.* [1994] 2 AC 199, 207; *WATTS & REYNOLDS*, *supra* note 5, ¶ 8-069.

12. T.B. SMITH, *A SHORT COMMENTARY ON THE LAW OF SCOTLAND* 777 (1962).

13. Wolfram Müller-Freienfels, *The Law of Agency*, in *CIVIL LAW IN THE MODERN WORLD* 77, 81 (A.N. Yiannopoulos ed., 1965).

concept in English commercial contexts.¹⁴ The novelty of this Article's argument is that undisclosed agency developed in roughly the same manner in the mixed legal systems. Orthodox reasoning contends: (1) the judges in the mixed legal systems identified a useful concept in a common law system—the United States or England; (2) the judges applied it in the mixed legal system, often with the thinly concealed aim of achieving desirable economic improvement; and (3) the concept opened the door in practice to new ways of contracting using agents. This Article reveals reported Scottish cases from the 17th century onwards, which suggest that a native Scottish concept may have developed before the Scottish courts experienced widespread English influence. In the case of Louisiana, the evidence is admittedly weaker. Yet drawing from a number of sources, this Article demonstrates that it is likely that undisclosed agency was alive and well before the courts in either Louisiana or Scotland began to apply precedents from English law or the law in other States of the Union.

To draw conclusions on the development of Louisiana and Scotland law, it is necessary to pinpoint the first emergence of undisclosed agency in the United States and England—the legal systems which are thought to be the “originating” legal systems from which the transplants¹⁵ were made. In addition to performing this task, the careful historical analysis provided in this Article also illustrates the reasons why undisclosed agency was, and is, commercially useful. The Article highlights the role of commercial factors in the context of sale of goods from the 18th century onwards.

Although the analysis in this Article is largely historical, the Article provides more than simply a backdrop for the modern law. The comparison between the two mixed legal systems reveals that in the field of *unidentified* agency, Louisiana and Scotland have developed novel solutions which are similar, but differ from the solutions which exist in the U.S. Restatement (Third) and English law, respectively. *Unidentified* agency occurs when the agent discloses that she is an agent but does not name her principal. These novel solutions continue to survive the influence of dominant common law neighbors. In the case of Louisiana, the novel solution was formalized during the revision of the Civil Code in 1997. Drawing on unpublished Minutes of Meetings of the Revision Committee, the author sheds new light on the influences which shaped the revised articles of the Civil Code. In the case of Scotland, the Scottish Inner House, the highest court in the Scottish legal system located in Scotland,

14. Roderick Munday, *A Legal History of the Factor*, 6 ANGLO-AM. L. REV. 221 (1977).

15. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974). For a more modern view, see MATHIAS SIEMS, *COMPARATIVE LAW* 191–221 (2014).

recently recognized the novel solution.¹⁶ Both Louisiana and Scotland, it seems, continue to exhibit their independence in this area. This Article explores why this might be the case, asking whether it is because the versions of the concept offered by United States and English law are unsatisfactory. This may be true of English law; Francis Reynolds, the leading expert on English agency law, recently stated: “[T]he category of unidentified principals has not yet been completely thought through.”¹⁷ The solutions adopted by Louisiana and Scotland may assist with this “thinking through.”

This Article makes contributions to scholarship that are useful beyond the context of agency law. Essentially, the comparison allows the author to test assumptions about the way in which mixed legal systems behave. This Article contends that undisclosed agency is not a legal transplant in Louisiana law and Scots law. Nevertheless, both legal systems have been subject to extensive influence from the common law. In the case of Scots law, a nascent Scottish concept was replaced by the equivalent English concept. This Article challenges the view that commercial law in mixed legal systems is based solely on the common law and therefore not suitable for comparative study. Those who express this view tend to base it on the fact that mixed legal systems adopt the commercial law of a common law neighbor *in toto* in order to facilitate access to markets dominated by that common law neighbor.¹⁸ After complete assimilation, so the argument goes, no vestiges of the civilian basis remain. This proves not to be the case in the context of agency law. Early law in the two legal systems rests on a civilian basis, developing from the—essentially Roman—contract of mandate. Complete assimilation did not occur in Louisiana and Scotland: the example of unidentified agency proves that this is not so. The manner in which common law influence is applied to a mixed legal system and the speed of assimilation are worthy of analysis. Issues considered in this Article include the role of the treatise writers and the courts in the process of assimilation. It is also possible to ask whether the mixed legal system

16. The final court of appeal on civil matters for the Scottish legal system is the Supreme Court in London. The case in question, *Ruddy v. Monte Marco* (2008) SC 667, was not appealed to the Supreme Court.

17. Francis Reynolds, *Unidentified Principals in Common Law*, in *AGENCY LAW IN COMMERCIAL PRACTICE* 55, 68 (Danny Busch et al. eds., 2016).

18. Kenneth G.C. Reid, reviewing the body of Smith’s work, suggests that this was Smith’s view. Kenneth G.C. Reid, *While One Hundred Remain: T B Smith and the Progress of Scots Law*, in *A MIXED LEGAL SYSTEM IN TRANSITION: T. B. SMITH AND THE PROGRESS OF SCOTS LAW* 10 (Elspeth Reid & David L. Carey Miller eds., 2005). Reid repeats this view in *The Idea of Mixed Legal Systems*, 78 *TUL. L. REV.* 5, 25 (2003).

was a willing recipient of common law influence.¹⁹ Also considered is whether new rules are examples of choosing the best of the approaches offered by the civilian and common law traditions, or fusing rules drawn from both. Rather than rejecting commercial law as a topic of mixed legal system scholarship, this Article embraces it.²⁰

The second contribution to wider private law is this Article's analysis of the role of a civil code in the development of a mixed legal system. A codified system, Louisiana, is compared with an uncoded system, Scotland. Vernon Palmer has suggested that a civil code can reinforce the civilian part of mixed legal systems, slowing down or impeding the penetration of the common law.²¹ This view is tested here in the specific context of undisclosed agency. The results are, in some respects, surprising. The presence of provisions in the Louisiana Civil Code which entirely conflicted with undisclosed agency did not prevent, or appear to slow down significantly, the development of undisclosed agency. The courts applied judge-made law which conflicted with the Civil Code for almost one hundred years until the Civil Code was revised in 1997. Palmer's suggestion does not therefore seem to reflect experience in Louisiana in this particular context. His view is perhaps borne out as applied to Scotland, however, the legal system assimilating with English law relatively quickly, although not completely.

The third contribution to wider private law relates not to mixed legal system scholarship, but rather to uncovering the exchange of ideas taking place between leading Scottish and United States treatise-writers in the early 19th century. This Article presents an important comparative discovery in the field of agency law. The Scottish institutional writer, George Joseph Bell, relied on the works of United States authors, principally James Kent, but also Joseph Story, in producing his works. Meanwhile, Kent and Story turned to Bell to justify their emerging

19. VERNON V. PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* 81 (Vernon V. Palmer 2d ed., 2012); see also Christopher K. Odinet, *Commerce, Commonality, and Contract Law: Legal Reform in a Mixed Jurisdiction*, 75 LA. L. REV. 741, 749 (2015) (referencing "voluntary assimilation").

20. For an example of thoughtful comparative work from a mixed legal system perspective in the field of commercial law, particularly his discussion of "gradual" and "voluntary" assimilation," see Odinet, *supra* note 19, at 747–48.

21. Vernon V. Palmer suggests that the civil law in the French group of mixed legal systems—including Louisiana—is "more highly resistant to common law penetration than the uncoded mixed systems." Vernon V. Palmer, *Mixed Jurisdictions*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 590 (Jan M. Smits ed., 2d ed. 2012).

positions on agency law. This Article explores why these authors turned to one another for inspiration. In a purely Scottish context, the analysis of Bell's work on agency provided in this Article contributes another piece to the jigsaw which is Bell's transformative contribution to Scots commercial law.

Turning to the scheme of this Article, Part I explains the legal and commercial benefits of using undisclosed agency. Part II lays the groundwork for the comparison, exploring the reasons why Louisiana and Scotland have been treated as mixed legal systems. It also justifies the choice of a comparative approach to a *commercial* law topic—commercial law generally being considered as being derived exclusively from the common law in mixed legal systems. Part III provides a short history of the development of Scots law for those unfamiliar with that legal system, focusing in particular on its mixed nature.²² Parts IV to VII chart the emergence of undisclosed agency in its “originating” legal system—English law, its appearance in the works of United States treatises on agency, in Louisiana law, and finally in Scots law. Part VIII offers comparative conclusions, and the Article ends with overall conclusions.

I. THE NATURE AND ECONOMIC BENEFITS OF UNDISCLOSED AGENCY

Undisclosed agency originated in the bankruptcy context, working to protect the principal from the agent's bankruptcy. In a modern context, undisclosed agency is available at the principal's option and can be used at any time; it is not limited to the context of bankruptcy. The way in which undisclosed agency protects the principal can be illustrated by using an example. Imagine that a third party (*T*) wishing to buy goods approaches *A*, who appears to be a seller. Although *T* does not know this, *A* is an agent, acting on behalf of an undisclosed principal (*P*), who is the owner of the goods. The existence of a principal, and the fact that *A* is an agent, are entirely concealed from *T*. *A* appears to be selling the goods in her own name. *T* buys the goods, and the goods are delivered to her. *A* has extended credit terms to *T*: *T* is not due to pay the price for another 30 days. At that point, *A* becomes bankrupt. *A*'s various creditors will look to *A*'s assets to satisfy their claims. *P* can, because of undisclosed agency, bypass *A* entirely and sue *T* directly for the purchase price. This is so even though *P* has no contract with *T*. Essentially, *A*'s bankruptcy will not impact *P*. *T* cannot be forced to pay the debt before the 30-days credit has elapsed. Once this period elapses, however, *T* can be forced to pay the purchase

22. Because this Article is published in a Louisiana law review, it will not provide a historical summary of the development of Louisiana law.

price directly to *P*, not *A*. The purchase price will not fall into *A*'s personal estate in bankruptcy, and therefore will not be available to *A*'s creditors.

One could characterize undisclosed agency, at a basic level, as a purely procedural rule which prevents circuity of action: the principal has a direct action against the third party. The principal need not take the longer route of suing the agent, prompting the agent to sue the third party. In a similar way, the third party can sue the principal directly: this avoids the third party having to sue the agent and the agent suing the principal. Whether it is the principal or third party who makes use of the direct action, the ability to bypass the agent's bankruptcy is an important practical benefit.

If undisclosed agency protects the principal where the agent becomes bankrupt, are other parties disadvantaged? To answer this question, consider the positions of the other actors in the scenario: the agent's unsecured creditors in bankruptcy; the agent; and the third party. Although the agent's unsecured creditors may appear to be losers, that is not the case. The funds are the principal's and do not belong to the agent, and the funds should not be available to the agent's personal creditors. The claims of the agent's unsecured creditors are therefore not pressing.

The agent runs an increased risk compared to normal disclosed agency. In disclosed agency, the agent acts as a conduit, or channel of rights, and does not become a contracting party with the third party. In undisclosed agency, by contrast, the agent has a binding contract with the third party. The agent is at risk of an action for breach of contract by the third party. The agent can, however, increase the fee she charges to the principal to reflect this increased risk. Additionally, the contract which the principal concludes with the agent is likely to contain an indemnity covering the agent's losses caused by such action. While it may be commercially useful for principals to act in this way, there is a price to be paid by the principal for doing so.

Finally, with respect to the third party, the prejudice lies in finding that she is a party to a contract with a stranger. This will come as a surprise. The third party is, however, called on to perform the contract on the same terms as originally agreed. The only difference is that she must perform to a different party. If performance is, essentially, payment of a price, this is a very small inconvenience. Even if the third party is the seller of goods, the terms of the contract, including agreed delivery dates and locations, will not change. If we ignore the element of surprise, undisclosed agency is, in fact, beneficial to the third party. Although the third party thought she had one debtor—the agent—it transpires that she has an alternative debtor—the principal. Where the context is the sale of goods, there seem

to be no obvious losers in undisclosed agency—except perhaps the doctrine of privity of contract.

A principal is not invariably entitled to act as an undisclosed principal. Under English law, a principal cannot do so where the contract between the agent and third party expressly excludes the possibility of a hidden principal, or where an implication arises from the terms of the contract that the agent contracts as principal.²³ Nor can the principal intervene where the contract has a strongly personal element.²⁴ These exceptions tend to be more relevant in contracts for services rather than sale of goods contracts.

Having explained the legal concept, the stage is set to explore the reasons why principals find it so commercially useful. In the context of a purchase of goods, undisclosed agency can prevent sellers' abusive behavior. A seller may inflate a contract price where the goods concerned are in scarce supply or where that seller knows that the buyer has deep pockets. The seller may inflate the price because she knows that the buyer relies heavily on a constant and uninterrupted supply of goods. Undisclosed agency allows the buyer to conceal her identity and can therefore prevent such behavior on the part of the seller, often acting to bolster specifically targeted competition legislation.

Turning to the case where the seller, rather than the buyer, acts as undisclosed principal, in English law, a principal as seller is not required to disclose his identity where the contract is an "ordinary commercial contract."²⁵ It is assumed that, in such ordinary commercial contracts, the identity of the seller is unimportant. That is certainly the case in short-term executed sale of goods contracts. When the parties are not joined in a long-term relationship, there is little or no unfairness to the buyer who is unaware of the seller's identity.

The agent, rather than the principal, may choose to use undisclosed agency. Agents are generally remunerated through commission; therefore, agents have important reasons to ensure that the principal sells goods to a third party using the agent as an intermediary on every occasion. If the principal sells directly to the third party, the agent will lose her commission. An agent may choose to keep the existence of a principal hidden, thereby ensuring that third parties always contract through the agent. The agent may spend a great deal of time finding and securing a third party as a contracting party for the principal. The principal may enter into successive transactions with that third party, each of which normally triggers the payment of commission to the agent. In such cases, the agent's

23. WATTS & REYNOLDS, *supra* note 5, ¶ 8-079.

24. *Id.*

25. *Siu Yin Kwan v. E. Ins. Co.* [1994] 2 AC 199.

use of undisclosed agency to protect her ongoing commission stream is understandable.

Whilst the context explored in this Article is sale of goods contracts, undisclosed agency has also proved useful in real estate transactions. In the United Kingdom, undisclosed agency has been used in the specific context of purchase by developers of land to be used for the construction of out-of-town retail parks or malls. The developer may need to buy different parcels of land from different sellers to make up the real estate on which the mall is to be constructed, and agents may be used on an undisclosed basis in order to do so. The principal is undisclosed to avoid the possibility that an individual seller may inflate the price because she knows that the viability of the development depends on all individual lots being successfully acquired. This is particularly the case where the area in question is required as a “sight-line”: these small pieces of land are located at the point at which the access road to the mall meets the main road; the driver exiting the access road on to the main road needs to have unimpeded vision left and right along the main road. Triangles of land on both sides must remain unbuilt upon in order to guarantee a clear view along the main road, ensuring that drivers leave the access road safely. The developer buys these areas of land to ensure that they remain undeveloped. These small pieces of land can become “ransom strips.” The owner of the strip, aware that the viability of the mall depends upon acquisition of the sight lines, can charge a high price. The developer may use an agent on an undisclosed basis to buy the strip of land in the hope that the seller will sell the land while unaware of its strategic importance and value. Such transactions often proceed successfully. Acquisitions of the development land as a whole may occur speculatively, before seeking planning permission. The use of agents in this way is not a purely British phenomenon—it has been suggested that Walt Disney Productions acquired parts of the land on which Disney World in Florida was built using undisclosed agents.²⁶

Less controversially, undisclosed agency is used in group company situations where, at the time of purchase of land, it is unclear which subsidiary in the group will ultimately become the owner of the land. This context poses theoretical problems, however. The legal precedents on undisclosed agency indicate that the principal must exist and have instructed the agent to act at the moment of formation of the contract.²⁷

26. R. MANN & B. ROBERTS, *BUSINESS LAW AND THE REGULATION OF BUSINESS* 624 (12th ed. 2016). The author is grateful to Dr. Lorna MacFarlane for directing her attention to this source.

27. This problem was recently explored in the context of English law by Francis M.B. Reynolds. *See* Reynolds, *supra* note 17, at 55.

The principal may be hidden, but she must exist and be identifiable. Practices within group company situations flout this legal requirement.

So far, this Article has focused on commercial situations only, reflecting the fact that undisclosed agency is, at least in English law, permitted in “ordinary commercial contracts.” The question which arises is whether it could be useful in a consumer context. In other words, when goods are sold to consumers, does it matter whether there is an undisclosed principal? Collins has suggested that in a modern world, the freedom to choose the party with whom an individual contracts has been eroded.²⁸ There may be benefits to consumers in concealing their identities. For example, news reports suggest that discrimination on grounds of ethnicity, race, or sex in the purchase of goods and services continues to take place.²⁹ A consumer fearing such discrimination could use an agent to make a purchase without disclosing her identity as principal. The seller, unaware of the identity of the purchaser, is less likely to refuse to contract. Consumers should, of course, not be forced to conceal their identities to gain free access to markets. Undisclosed agency could only provide a poor alternative to specifically targeted anti-discrimination legislation. As a result, there appear to be no pressing reasons to extend the concept to a consumer situation.

Present in common law systems, undisclosed agency has also attracted the attention of civilian scholars, in positive terms.³⁰ The next Part of this

28. Hugh Collins, *The Vanishing Freedom to Choose a Contractual Partner*, 76 L. & CONTEMP. PROBS. 71 (2013).

29. Growth in the use of apps such as Airbnb has led to reports of individuals being refused access to properties they have rented on grounds of race. This has, in turn, led to the creation of similar apps specifically for black users. See Ijeoma Oluo, *An Airbnb Service for Black People? I Wish it Weren't Necessary*, GUARDIAN (June 8, 2016), <https://www.theguardian.com/commentisfree/2016/jun/08/airbnb-service-black-people-noirbnb-noirebnb> [<https://perma.cc/R5ZB-9D4R>]. The U.K. Supreme Court recently decided that a refusal by a bakers' shop to supply a cake iced with the message “support gay marriage” because of the religious beliefs of the bakery owners did *not* constitute discrimination on grounds of sexual orientation under the Fair Employment and Treatment (Northern Ireland) Order 1998 (SI 1998/3162 (NI21)). See *Lee v. Ashers Baking Co. & Ors.* [2018] UKSC 49. See also *Masterpiece Cakeshop v. Co. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (a case on similar facts).

30. Jeroen S. Kortmann and Sebastian Kortmann conclude that undisclosed agency is preferable to the versions of indirect representation offered by civil law systems on the basis that undisclosed agency allows the principal to sue the third party and, in addition, the third party to sue the principal. Civilian versions tend to allow a direct action by the principal only. See Sebastian Kortmann & Jeroen Kortmann, *Undisclosed Indirect Representation—Protecting the Principal, Third*

Article lays the groundwork for the comparison before turning to examine Louisiana law and Scots law.

II. THE CONCEPT OF A “MIXED LEGAL SYSTEM” AND AGENCY LAW IN MIXED LEGAL SYSTEM SCHOLARSHIP

Writing in 1899, F.P. Walton said of both Louisiana law and Scots law: “[T]he law occupies a position midway between the Common Law and the Civil Law. It has drawn largely from both sources.”³¹ T.B. Smith, more than any other author, is well known for describing Louisiana law and Scots law as “mixed legal systems” and encouraging comparison between the two.³² His definition of a mixed legal system was: “basically a civilian system that had been under pressure from the Anglo-American common law and has in part been overlaid by that rival system of jurisprudence.”³³

Palmer, in particular, has developed this historical idea of a mixed legal system.³⁴ There has not, however, been uncritical acceptance of Smith’s definition. The concept of a mixed legal system is “far from clear.”³⁵ Every legal system is, in a sense, mixed.³⁶ This Article does not intend to debate whether a category of mixed legal systems exists and, if so, the content of that category.³⁷ Louisiana and Scotland have certainly been treated as “classic” or “traditional”³⁸ mixed legal systems in the past;

Party, or Both?, in AGENCY LAW IN COMMERCIAL PRACTICE, *supra* note 17. See also Hendrik Verhagen & Laura Macgregor, *Agency and Representation*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW, *supra* note 21.

31. F.P. Walton, *The Civil Law and the Common Law in Canada*, 11 JUR. REV. 282, 291 (1899).

32. T.B. SMITH, *STUDIES CRITICAL AND COMPARATIVE* iii (1962).

33. T.B. Smith, *The Preservation of the Civilian Tradition in “Mixed Jurisdictions”*, in CIVIL LAW IN THE MODERN WORLD, *supra* note 13, at 3.

34. See PALMER, *supra* note 19.

35. Reinhard Zimmermann, Daniel Visser & Kenneth Reid, *Introduction*, in MIXED LEGAL SYSTEMS IN COMPARATIVE PERSPECTIVE: PROPERTY AND OBLIGATIONS IN SCOTLAND AND SOUTH AFRICA 3 (2004).

36. This is, broadly, the starting position of *STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING* (Esin Öricü et al. eds., 1996).

37. It has recently been suggested that mixed legal system scholarship has a political nationalist motivation in Scotland, a claim which is vigorously resisted by this author. See Andreas Rahmatian, *The Political Purpose of the Mixed Legal System Concept in Scotland*, 24 MAASTRICHT J. EUR. & COMP. L. 843 (2017).

38. Jacques Du Plessis, *Comparative Law and Study of Mixed Legal Systems*, in OXFORD HANDBOOK OF COMPARATIVE LAW 480, 484 (Reinhard Zimmermann & Matthias Reimann eds., 2009).

there is already scholarship comparing the two legal systems.³⁹ Louisiana and Scotland appear, to the current author at least, to face the same challenges of developing a legal system which has drawn from both civilian and common law traditions and the need to integrate both parts. It is useful and worthwhile to examine a legal system that faces the same problems as one's own.

To say that Louisiana and Scotland are mixed in nature is not to say that they share common legal sources. The civilian sources of Louisiana law are Spanish and French, whereas, as is explored in detail in Part III, the civilian sources of Scots law arise from the reception of the *ius commune* in Europe.⁴⁰ On the common law side, the law of the other States of the Union has influenced Louisiana law, whereas English law influenced Scots law. More obviously, Louisiana law is codified whereas Scots law is not. The reason for the comparison carried out in this Article is to explore the manner in which the two legal systems have developed historically in a particular field of law.

In the 1950s, Wolfram Müller-Freienfels pioneered a comparative approach to agency law.⁴¹ This interest has not continued into more recent times—with some exceptions.⁴² This is unfortunate given that agency law has been considered highly appropriate for comparative study, particularly by mixed legal system scholars. Analyzing the 1997 revision of the Representation and Mandate sections of the Louisiana Civil Code, Michael North commented that the term “mixed legal system” was

39. Arguably the first detailed comparison was carried out by John A. Lovett in *A New Way: Servitude Relocation in Scotland and Louisiana*, 9 EDIN. L. REV. 352 (2005). See also MIXED JURISDICTIONS COMPARED (Vernon V. Palmer & Elspeth C. Reid eds., 2009).

40. O.F. Robinson, T.D. Fergus and W.M. Gordon, although noting that the *ius commune* is difficult to define, nevertheless state, “It is indeed the result of the coming together – in varying proportions from place to place and time to time – of local custom with feudal law, Roman law in modified and elaborated form, canon law and the law merchant.” O.F. ROBINSON ET AL., EUROPEAN LEGAL HISTORY 107 (3d ed. 2000). See discussion *infra* Part III.

41. Although his work spanned the entirety of agency law, articles specifically on the undisclosed principal include: Wolfram Müller-Freienfels, *The Undisclosed Principal*, 16 MOD. L. REV. 299 (1953); and Wolfram Müller-Freienfels, *Comparative Aspects of Undisclosed Agency*, 18 MOD. L. REV. 33 (1955).

42. Comparative work in this area has been carried out by the current author with Danny Busch. See THE UNAUTHORISED AGENT PERSPECTIVES FROM EUROPEAN AND COMPARATIVE LAW (Danny Busch & Laura Macgregor eds., 2009). See also the work carried out in a European context, PRINCIPLES OF EUROPEAN LAW, STUDY GROUP ON A EUROPEAN CIVIL CODE, MANDATE CONTRACTS (Marco B. M. Loos & Odavia Bueno Diaz eds., 2013).

“particularly apropos when discussing ‘agency’ concepts.”⁴³ Holmes and Symeonides, writing a year later, suggested that the new Louisiana law was “worthy of a careful examination by other civil-law or mixed jurisdictions that recognize the same needs.”⁴⁴ Such pressing invitations having been extended, it seems high time for Scots lawyers to respond.

Commercial law in mixed legal systems is often identified as common law in nature, the civilian part being obscured.⁴⁵ According to Palmer, this occurs because of “the requirements of commerce, perceptions of economic self-interest and the belief that civil law differences would be a hindrance to trade and should be eliminated.”⁴⁶ Adoption of the common law both facilitates trade between the mixed system and the dominant economic power; it has, at times in the past, strengthened colonial rule.⁴⁷ The mixed legal system may be a willing recipient of the common law commercial rules,⁴⁸ viewing those rules as a passport providing access to new markets. These are the ideas which may have led to a lack of comparative interest in commercial law. Few vestiges of the civil law may remain. Certainly, commercial law, broadly understood, has not benefitted from the same attention from mixed legal system scholars as parts of private law such as property law or family law.⁴⁹

Where does agency law lie in this debate? Given that the use of an intermediary is central to the development of a market economy, agency law could be classified as part of commercial law. This assumption may have led it to be overlooked by mixed legal system scholars. Given that the major focus of agency law is the formation of contracts, it could be classified as part of contract law; contract law tends to be treated as “mixed” in nature.⁵⁰ The civilian influence on both Scots contract law and

43. Michael B. North, *Qui Facit Per Alium, Facit Per Se: Representation, Mandate, and Principles of Agency in Louisiana at the Turn of the Twenty-First Century*, 72 TUL. L. REV. 279, 281 n.6 (1997).

44. Wendell H. Holmes & Symeon C. Symeonides, *Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law*, 73 TUL. L. REV. 1087 (1999).

45. See *supra* note 19.

46. Palmer, *supra* note 21, at 597.

47. Du Plessis, *supra* note 38, at 490.

48. Palmer noted this point in relation to the Louisiana business community after the Louisiana Purchase. PALMER, *supra* note 19, at 81.

49. See *Agency*, in EUROPEAN CONTRACT LAW: SCOTS AND SOUTH AFRICAN PERSPECTIVES (Hector L. MacQueen & Reinhard Zimmermann eds., 2006) (the current author's chapter comparing Scots and South African law).

50. Scots and Louisiana contract law have been compared in MIXED JURISDICTIONS COMPARED, *supra* note 39. Scots and South African contract law have been compared in EUROPEAN CONTRACT LAW: SCOTS AND SOUTH AFRICAN PERSPECTIVES, *supra* note 49.

Louisiana contract law can be seen in the presence of a native third party right in both systems⁵¹ and the lack in both systems of the common law doctrine of consideration. If agency is classified as part of contract law, then it may indeed be suitable for analysis by mixed legal systems scholars.

The picture is, however, much more complicated. Agency law is not confined to either contractual or commercial contexts. Certainly, agents are most typically used in the formation of contracts. Agency is, however, highly relevant in the context of tort law. All three Restatements on agency cover tort situations comprehensively.⁵² Looking specifically at undisclosed agency, the Restatement (Third) of Agency covers the specific situation in which a third party suffers injury as a consequence of an agent's tortious conduct when the principal is undisclosed. The United Kingdom Supreme Court recently considered whether it should hold an undisclosed principal liable for an agent's negligent misrepresentation, and answered this question in the negative.⁵³ There has been a good deal of confusion amongst agency scholars about the scope of agency law, amounting almost to an anxiety.⁵⁴ Thus far, one can conclude that it is not possible to pigeonhole agency within commercial law, or indeed contract law. There is no reason why it should be excluded from the work of mixed legal system scholars.

Looking specifically at Louisiana law, the presence in the Civil Code of a section on Representation and Mandate suggests that agency is treated as part of the civil law or private law. Although the Louisiana Legislature drafted a commercial code containing provisions on commercial agency

51. Scots law possessed a common law third party right, known as *jus quaesitum tertio*. See J. DALRYMPLE, VISCOUNT STAIR, *THE INSTITUTIONS OF THE LAW OF SCOTLAND* 10, 13 (2d ed. 1693, reprinted 1981). The concept has recently been enshrined in statute. See *The Contract (Third Party Rights) (Scotland) Act 2017*. For Louisiana, see LA. CIV. CODE art. 1985 (2019).

52. In the United States, recognition of tort's links with agency—and vice versa—did not happen immediately; tort law was considered not in the first, but in the second edition of Floyd R. Mechem's *TREATISE ON AGENCY* (2d ed. 1914). This may be because Mechem came to the law of agency from the law of contract. I am grateful to Deborah DeMott for this suggestion.

53. *Banca Nazionale Del Lavoro Spa v. Playboy Club London Ltd. & others* [2018] UKSC 43.

54. See Laura Macgregor & Deborah DeMott, *Defining Agency and Its Scope I*, in *COMPARATIVE CONTRACT LAW: BRITISH AND AMERICAN PERSPECTIVES* 381 (Larry A. DiMatteo & Martin Hogg eds., 2016); Laura Macgregor & Deborah DeMott, *Defining Agency and Its Scope II*, in *COMPARATIVE CONTRACT LAW*, *supra*, at 396.

in 1825, it was never enacted.⁵⁵ The reasons why are not particularly clear. Richard Kilbourne suggests that the legislature abandoned it rather than rejected it, “because it either doubted its power to legislate in the area of commercial law or recognized a potential area of conflict between the state and federal judicial systems.”⁵⁶ Failure to enact a commercial code undoubtedly paved the way for common law influence. The fact that codification of commercial law was even considered is important—to enact a commercial code is a “uniquely civilian approach.”⁵⁷ This failure led Kilbourne to describe the attitude towards the State’s civilian heritage as “somewhat muddled.”⁵⁸

The uncodified nature of Scots law makes it more difficult to classify agency law in that legal system. Niall Whitty observes: “[N]o clear division exists between commercial law and large swathes of the law of property and obligations.”⁵⁹ The early history of agency law in Scotland is certainly civilian—the contract of mandate, a gratuitous contract which was the forerunner of agency, is considered in detail in the works of the Scottish institutional writers, Stair, Bankton, and Erskine, writing from the late 17th century onwards.⁶⁰ By the 19th century, Bell developed the gratuitous contract of mandate into modern agency law.⁶¹ United Kingdom statutory “codifications” of commercial law taking place in the late 19th century then affected agency law.⁶² In textbooks, there has been a tendency

55. RICHARD H. KILBOURNE, JR., *LOUISIANA COMMERCIAL LAW: THE ANTEBELLUM PERIOD* 25 (1980); Max Nathan, Jr., *In Search of a Missing Link: Edward Livingston and the Proposed Code of Commerce for Louisiana*, 48 *TUL. L. REV.* 43 (1973–74).

56. KILBOURNE, JR., *supra* note 55, at 33.

57. *Id.* at 25.

58. *Id.* at 28.

59. Niall R. Whitty, *The Civilian Tradition and Debates on Scots Law*, 1996 *J. S. AFR. L.* 227, 449 (1996).

60. DALRYMPLE, *supra* note 51; A. MCDOUALL, *LORD BANKTON, AN INSTITUTE OF THE LAWS OF SCOTLAND* (1751–53, reprinted in *Stair Society Vols.* 41–43, 1993–95); J. ERSKINE, *AN INSTITUTE OF THE LAW OF SCOTLAND* (1st ed. 1773) (report by the Edinburgh Legal Education Trust 2014 with an introduction by Kenneth G.C. Reid).

61. GEORGE J. BELL, *COMMENTARIES ON THE LAWS OF SCOTLAND*, Vols. 1 & 2 (2d ed. 1810).

62. See Bills of Exchange Act 1882, Partnership Act 1890, Sale of Goods Act 1893 and Marine Insurance Act 1906; Alan Rodger, *The Codification of Commercial Law in Victorian Britain*, 108 *L.Q. REV.* 570 (1990). Under the Factors Act 1889 (applied to Scotland by the Factors (Scotland) Act 1890), mercantile agents left in possession of goods with the consent of the principal can

to treat it as part of contract law, appearing as an extra chapter at the end of the book.⁶³ Only in 2013 do we see publication of the first major book dedicated solely to Scottish agency law.⁶⁴ As in the United States, a modern view of Scots agency law would recognize agency's relevance to tort—delict, in Scots law.⁶⁵ Agency law also interfaces with the law of unjustified enrichment.⁶⁶

This Part has introduced Louisiana law and Scots law as mixed legal systems. It has also noted assumptions that, in commercial law, mixed legal systems assimilate *completely* with the common law. Classification of agency law as part of commercial law may have led it to be overlooked by mixed legal system scholars, concluding that few vestiges of the civil law remain. It has been argued here that agency law permeates widely, through commercial law, contract law, tort law, and enrichment law. There is therefore every reason for mixed legal systems scholars to consider it.

III. NATURE AND HISTORICAL DEVELOPMENT OF SCOTS LAW

This Part provides a short summary of the development of Scots law to assist readers who are unfamiliar with the nature and sources of the Scottish legal system. Crucially, this Part explains why Scots law has been described as mixed in nature.

A. *The Reception of Roman Law*

Roman law was received into Scots law in different ways and at different stages.⁶⁷ The canon law of the church courts provided a route for the application of Romano-canonical procedure in Scotland. From the middle ages, canon lawyers in Scotland applied Roman law. With the development of a central court in 1532—the Court of Session—the Court continued to use the Romano-canonical procedure, and the canon lawyers

pass title to those goods to third parties acting in good faith. See LAURA MACGREGOR, *THE LAW OF AGENCY IN SCOTLAND* ¶¶ 3-07, 3-08 (2013).

63. WILLIAM M. GLOAG, *THE LAW OF CONTRACT* (2d ed. 1929). The classic text on Scots contract law, WILLIAM W. MCBRYDE, *THE LAW OF CONTRACT IN SCOTLAND* (3d ed. 1997), does not cover agency law.

64. This is *THE LAW OF AGENCY IN SCOTLAND* (2013) by the current author.

65. See MACGREGOR, *supra* note 62, ch. 13.

66. A recent line of Scottish cases sought to use agency law to resolve problems caused in a classic enrichment situation, payment of another party's debt. See Laura J. Macgregor & Niall R. Whitty, *Payment of Another's Debt, Unjustified Enrichment and ad hoc Agency*, 15 EDIN. L. REV. 57 (2011).

67. PAUL DU PLESSIS, *BORKOWSKI'S TEXTBOOK ON ROMAN LAW* 389–94 (5th ed. 2015).

dominated its personnel.⁶⁸ Bill Gordon suggested that Scotland should be aligned with other European nations, that the civil law was introduced into Scotland initially through canon law and the involvement of canon lawyers in the dispensation of justice in Scotland.⁶⁹

Legal education is an important part of this story. Scottish students attended universities in France and Italy from at least the 13th century.⁷⁰ Law appears, at this period, to have been a popular choice for Scottish students studying abroad.⁷¹ The creation of Scottish law schools did not initially alter this situation significantly. Although it became possible to study law at the Universities of St. Andrews and Glasgow from 1412 and 1451, respectively, Scottish students continued to attend universities in France and Germany.⁷² After the Reformation, study in the Netherlands became popular, and this popularity continued up until the first half of the 18th century.⁷³ Thus, before the Reformation, Scots students studied canon law, and later civil law. These ideas were applied by them in their professional lives upon returning to legal practice in Scotland.⁷⁴ Historically, large swathes of the Scottish legal profession had been educated in Europe, and the law that they brought back to Scotland was civilian in nature. It was only at the beginning of the 18th century, with

68. *Id.* at 390 (citing J.J. Robertson, *The Canon Law Vehicle of Civilian Influence with Particular Reference to Scotland*, in *THE CIVILIAN TRADITION AND SCOTS LAW: ABERDEEN QUINCENTENARY ESSAYS* 117 (D.L. Carey-Miller & R. Zimmermann eds., 1997)).

69. William M. Gordon, *Scotland as a Mixed Jurisdiction*, in 1 *AU-DELÀ DES FRONTIÈRES. MÉLANGES DE DROIT ROMAIN OFFERTS À WITOLD WOŁODKIEWICZ* 323–31 (M. Zablocka et al. eds., 2000) (*available in* William M. Gordon, *ROMAN LAW: SCOTS LAW AND LEGAL HISTORY, SELECTED ESSAYS* 343, 346 (2007)).

70. ROBINSON ET AL., *supra* note 40, at 121; G. Campbell H. Paton, *The Dark Age*, in *AN INTRODUCTION TO SCOTTISH LEGAL HISTORY 1329–1532* (Stair Society vols. 20, 23 1958).

71. Research by D.E.R. Watt has indicated that, between 1340–1410, 400 graduates studied abroad. It was possible to identify the subject choice of 230 of them: 120 pursued a law degree, whereas 110 pursued an arts degree. Of those arts students, a further 80 went on to study law. *See* D.E.R. Watt, *University Graduates – Scottish Benefices Before 1440*, 77, 79 15 R. S. C. H. S. (1964). The author is grateful to Professor John W. Cairns for drawing this source to her attention.

72. ROBINSON ET AL., *supra* note 40, at 121.

73. John W. Cairns, *Historical Introduction*, in 1 *A HISTORY OF PRIVATE LAW IN SCOTLAND*, at Introduction and Property 156 (K. Reid & R. Zimmermann eds., 2000).

74. For example, William Elphinstone became Bishop of Aberdeen and Chancellor of Scotland. *See* DU PLESSIS, *supra* note 67, at 390.

the revival of the law professorship at the University of Glasgow, and the creation of three chairs in law at the University of Edinburgh, that legal education in Scotland flourished.⁷⁵ The cessation of the tradition of studying abroad is, for John Cairns, a significant factor in breaking with the *ius commune*.⁷⁶

During the late 15th century, the use of Roman law continued in practice, particularly in Roman-derived arguments Scottish advocates used in court⁷⁷—advocates being the body of legal professionals having rights of audience in the higher courts in Scotland and the Supreme Court in London.⁷⁸ A qualification in Roman law, whilst not necessary for entry to the solicitors' profession in Scotland,⁷⁹ was a requirement for entry to the Faculty of Advocates in the 17th century and remains a requirement today.⁸⁰

B. The Institutional Period and Union with England

Of particular importance in the development of Scots law is the role of the Scottish Institutional writers who wrote from the 17th century onwards. Their works continue to be regarded as formal sources of law and are used in modern Scottish court pleadings and judgments, albeit sparingly. In the earliest Institutional work, Thomas Craig's *Jus Feudale*, written around 1600,⁸¹ Craig explained: "[W]e are bound by the laws of the Romans only in so far as they are congruent with the laws of nature and right reason."⁸² Bill Gordon suggested that the most significant of the institutional writers, James Dalrymple and Viscount Stair, used the civil

75. John W. Cairns, *Institutional Writings in Scotland Reconsidered*, 4 J. LEGAL HIST. 76, 94–95 (1983).

76. Cairns, *supra* note 73, at 165.

77. DU PLESSIS, *supra* note 67, at 390.

78. Members of the Scottish Faculty of Advocates had exclusive rights of appearance in the higher courts in Scotland until the passing of the Law Reform (Miscellaneous Provisions) Scotland Act 1990. In terms of s. 24, Scottish solicitors were given the right to become solicitor-advocates having rights of audience in the higher courts. A solicitor must meet a number of requirements, including success on the appropriate exams.

79. Solicitors form the main branch of the legal profession in Scotland, see Solicitors (Scotland) Act 1980, s. 65. For advocates, see *supra* note 78.

80. DU PLESSIS, *supra* note 67, at 390.

81. John Cairns, *The Breve Testatum and Craig's Jus Feudale*, 56(3) TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 311, 311–32 (1988).

82. 1 Tit. II, 14, T. CRAIG, *JUS FEUDALE* (1655). Although written in 1603, it was published in 1655.

law as inspiration where no native legal rule existed.⁸³ At this stage, the written sources of the *ius commune* were important because there was little written law in Scotland.⁸⁴

Toward the end of the 17th century, the economic benefits to Scotland of Union, including access to English trade routes with the colonies, proved irresistible to the Scots. Although the Treaty of 1707 created a Union between Scotland and England, its practical effect was rather to subsume Scotland into England.⁸⁵ The English Parliament, for example, became the Parliament of the United Kingdom. With regard to the separate Scottish legal system, the Treaty of Union provided in its 18th article for the application in Scotland of the same laws on trade, customs, and excise as in England. A distinction was made, however, between laws concerning “Publick Right, Pollicy and Civil Government” and those concerning “Privat Right.”⁸⁶ The former could be made the same throughout the United Kingdom; with regard to the latter, “no alteration may be made in Laws which concern Privat Right Except for the evident utility of the Subjects within Scotland.”⁸⁷

The 19th article of the Treaty of Union preserved the two highest courts in Scotland, the Court of Session—with jurisdiction over civil matters—and Court of Justiciary—with jurisdiction over criminal matters—“in all time coming within Scotland.”⁸⁸ The Treaty was, however, silent on the possibility of appeals from the Scottish Court of Session to the House of Lords in London. According to John Cairns, it was “simply assumed” that appeal did, in fact, lie.⁸⁹ Following the Union, there was swift growth of Scottish appeals to the House of Lords. Indeed, in the late 18th and early 19th centuries, the vast majority of the cases heard by the House of Lords were Scottish appeals,⁹⁰ a truly remarkable fact given that the population of England may have been more than five times larger

83. William M. Gordon, *Roman Law in Scotland*, in *THE CIVIL LAW TRADITION IN SCOTLAND* 13, 29 (Robin Evans-Jones ed., 1995).

84. Cairns, *supra* note 73, at 101.

85. Union was effected by two Acts: firstly, the Union with Scotland Act 1706 (c. 11) passed by the English Parliament, and, secondly, the Union with England Act 1707 (c. 7), passed by the Scottish Parliament. These Acts put into effect the Treaty of Union 1707.

86. Treaty of Union 1707, art. XIX.

87. APS, XI, appendix, 203.

88. Treaty of Union 1707, art. XIX.

89. Cairns, *supra* note 73, at 123–24.

90. N.T. Phillipson noted that from 1794–1807, 419 of the 501 appeals to the Lords came from Scotland. 37 *THE SCOTTISH WHIGS AND THE REFORM OF THE COURT OF SESSION 1785-1830* 85 (Stair Society 1990).

than Scotland at that time.⁹¹ There was not then—and is not now—any legal rule specifying a minimum number of Scottish-trained judges who must sit to hear Scottish appeals to the Supreme Court.⁹² By convention, Scottish Justices take the lead in modern appeals from Scotland. At times English judges in this court do not seem to have been aware of the differences between Scots and English law. Appeals to the House of Lords have therefore acted as a route for English influence into Scots law.⁹³ The Supreme Court remains the final court of appeal for Scots law in civil but not criminal matters, the High Court of Justiciary in Edinburgh being the final court of appeal for the latter.

C. The Development of Scots Commercial Law

In commercial matters in the late 18th century, legislative activity focused on the law of bankruptcy.⁹⁴ The following statement made by a Scottish judge, Lord Hailes, in 1774, certainly suggests that English law—and not the civil law—had become the main point of reference for the Scottish courts at this time: “We in Scotland are in the helpless infancy of commerce; . . . On a mercantile question, especially concerning insurance, I would rather have the opinion of English merchants, than of all the theorists and all the foreign ordinances in Europe.”⁹⁵

In 1826 the institutional writer, George Joseph Bell, produced his *Commentaries on the Law of Scotland and on the principles of mercantile jurisprudence*: a book that had developed from an earlier text focusing specifically on bankruptcy law.⁹⁶ Bell drew on many different influences in his work, including French law, United States law, and English law.

91. An internet search suggests that, in 1707, the Scottish population may have been about 1 million, and the English population 5.5 million. Brian Logan, *How Scotland in 2011 Compares to 1707*, GUARDIAN (May 20, 2011, 2:00 PM) <https://www.theguardian.com/uk/2011/may/20/how-scotland-compares-1707-2011> [<https://perma.cc/7BSS-X2KK>]; Gerald Warner, *History of the Union—Part Two 1707-1783*, TELEGRAPH (Dec. 11, 2007, 12:01 AM) <http://www.telegraph.co.uk/news/uknews/1572149/History-of-the-Union-Part-two-1707-1783.html> [<https://perma.cc/7RLS-ZGF6>].

92. The Supreme Court, created in 2009 under the Constitutional Reform Act 2005, s. 23(1), is the statutory successor to the House of Lords. Its judges are known as “Justices.”

93. Cairns, *supra* note 73, at 124.

94. This includes the Bankruptcy Act 1772.

95. David Dalrymple, Lord Hailes, *Decisions of the Lords of Council and Session from 1766 to 1791* 622 (M.P. Brown ed., 1826) (Dec. 16 1774) (cited by Cairns, *supra* note 73, at 162).

96. TREATISE ON THE LAW OF BANKRUPTCY IN SCOTLAND (1800–04).

Commentaries has institutional status—that is, is treated as an actual source of law—and is notable for extensive reliance on English case law. It stands at the end of what Lord Cockburn called the “last purely Scotch age.”⁹⁷ Progress from here was singularly focused on greater integration with England.

At the end of the 19th century, commercial law was “codified”⁹⁸ for the United Kingdom, and indeed for other parts of the Empire, such as India. The United Kingdom passed statutes applying to important areas of commercial law, such as bills of exchange, sale, partnership, and insurance.⁹⁹ These codifying statutes were to have long-lasting impact, and some can still be found on the statute books in largely the same form.¹⁰⁰ The results of such codifications were not always wholly positive for Scots law. Partnership law illustrates this point. There are significant differences between Scots and English partnership law: crucially, the Scottish partnership has separate legal personality whereas the English partnership does not.¹⁰¹ The Bill preceding the Partnership Act of 1890, originally drafted to apply to England alone, was amended in its final stages of passage through Parliament so that it applied also to Scotland.¹⁰² This decision, which the Scottish Faculty of Advocates somewhat surprisingly

97. 1 HENRY COCKBURN, *LIFE OF LORD JEFFREY WITH A SELECTION FROM HIS CORRESPONDENCE* 157 (1852) (cited by Cairns, *supra* note 73, at 177).

98. The word “codified” is used here in a non-technical sense. The impact of these statutes was not to produce a “code” as that word is understood in the civil law tradition.

99. For the individual Acts, see *supra* note 62; Rodger, *supra* note 62.

100. This comment applies to the Bills of Exchange Act 1882 and the Partnership Act 1890. The Marine Insurance Act 1906 remained on the statute book largely untouched until the enactment of recent legislation, including, for business insurance, the Insurance Act 2015, which came into force in 2016.

101. See Partnership Act 1890 REGNAL. 53 and 54 VICT. § 4, ¶ 2: “In Scotland a firm is a legal person distinct from the partners of whom it is composed.” This difference impacts the idea of partners as agents, s. 5 of the Act being loosely drafted to take this into account: “Every partner is an agent of the firm and his other partners.” *Id.* With the passing of the Limited Liability Partnership Act in 2000, English law, for the first time, acquired a type of partnership with separate legal personality. A further difference between Scots and English law relates to the sharing of liabilities in partnerships. The concepts joint liability and several liability have different meanings in Scots and English law. Section 9 of the 1890 Act required to take this into account: “Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all the debts and obligations of the firm incurred while he is a partner.” *Id.*

102. Rodger, *supra* note 62, at 578.

supported,¹⁰³ was made notwithstanding the significant differences between Scots and English partnership law. The end result is that, to quote George Gretton, “it is necessary to avoid reading the Act in a literalistic manner.”¹⁰⁴ More recently, the Government failed to enact law reform emanating from a joint project by the Scottish and English Law Commissions which would have removed these problems.¹⁰⁵ To conclude this Part, one can say that English law certainly influenced Scots law. Legislative change applying to the United Kingdom as a whole has not always taken account of the important differences that exist between the two legal systems.

D. When Did Scots Law Become Mixed in Nature?

Views differ on when Scots law became a mixed legal system. On one side of the debate are Hector MacQueen and David Sellar, who stated: “It has been a ‘mixed’ system from the very beginning.”¹⁰⁶ In asserting that Scots law has *always* been mixed, MacQueen specifically contrasted Scots law with Louisiana law, characterizing the latter as a system in which the civil law was overlaid with the common law.¹⁰⁷ On the other side of the debate is Niall Whitty, who described this view as “misleading,”¹⁰⁸ and questioned whether evidence of English influence existed before the creation of the United Kingdom in 1707.¹⁰⁹ Kenneth Reid and Reinhard Zimmermann identify the second half of the 19th century, the time of the great United Kingdom commercial codifications, as the main period of

103. The Faculty of Advocates is the part of the Scottish legal profession which, at that time, had exclusive rights to appear in the higher Scottish courts, namely the Outer and Inner Houses of the Court of Session and the House of Lords in Scottish appeals.

104. George L. Gretton, *Partnership Property*, JUR. REV. 163, 168 (1987).

105. “Report on Partnership Law” (Law Commission No 283, Scottish Law Commission No 192) (Nov. 2003).

106. Hector MacQueen & David Sellar, *Unjust Enrichment in Scots Law*, in UNJUST ENRICHMENT, THE COMPARATIVE LEGAL HISTORY OF THE LAW OF RESTITUTION 298 (E.J.H. Schrage ed., 1995). Both authors reiterated their view more recently. See Hector L. MacQueen, *Scots law*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW, *supra* note 21, at 789; David Sellar, *Scots Law: Mixed From the Very Beginning? A Tale of Two Receptions*, 4 EDIN. L. REV. 3 (2000).

107. MacQueen, *supra* note 106, at 789. According to MacQueen, South Africa, Québec, and Sri Lanka resemble Louisiana law in this respect. *Id.*

108. Whitty, *supra* note 59, at 232.

109. *Id.* at 442.

reception of English law.¹¹⁰ One can conclude therefore that, while most authors agree that Scots law is a mixed legal system, they disagree on the point at which English law significantly influenced it.

IV. UNDISCLOSED AND UNIDENTIFIED AGENCY IN ENGLISH LAW

To determine whether undisclosed agency is a legal transplant or a native development in Louisiana law and Scots law, it is necessary to identify the point at which it arose in the legal systems where it is thought to have originated. In the Parts which follow, the development of the concept in English law and in the works of 19th century United States treatise-writers is identified. The analysis then turns to the appearance of the doctrine in Louisiana law and Scots law.

A. *The Role of the Factor*

Undisclosed agency developed in English law from the 16th century onwards from the use of commercial actors known as “factors.” The factor was a type of agent who sold goods for his principal in his own name, without disclosing the existence of the principal.¹¹¹ The factor was remunerated through commission on sales transacted. Although the term factor was not used with a high degree of accuracy,¹¹² the factor can nevertheless be distinguished from other commercial actors, specifically the broker and the commission agent. The broker did not, in general, buy or sell goods in *his own name*.¹¹³ The commission agent was generally unable to create contractual privity between his principal and a third party.¹¹⁴

Factors were specifically linked to foreign trade. In essence, a geographically remote principal could consign goods for sale to a factor in a different country. The factor could sell those goods to a buyer local to

110. 1 A HISTORY OF PRIVATE LAW IN SCOTLAND, *Introduction and Property*, preface, 12–13 (2000).

111. *Baring v. Corie* (1818) 1 B & Ald 137 per Abbott, CJ at 143. See Munday, *supra* note 14; Gerard H.L. Fridman, *Undisclosed Principals and the Sale of Goods*, in AGENCY LAW IN COMMERCIAL PRACTICE, *supra* note 17, ¶ 5.02.

112. Munday, *supra* note 14, at 229.

113. *Id.* at 225. The broker may have later developed an ability to act in his own name. See S.J. STOLJAR, THE LAW OF AGENCY ITS HISTORY AND PRESENT PRINCIPLES 209, 243 (1961).

114. There may have been a rebuttable presumption against the commission agent having any ability to create contractual privity. *Ireland v. Livingstone* [1871–72] SCLR 5 (HL) 395; *Armstrong v. Stokes* [1872] SCLR 7 (QB) 598.

him, the factor acting in his own name. For the buyer, this posed less risk than contracting with an unknown foreign seller. The local factor's reputation is known and can be relied upon. Factor and buyer might be linked in social, ethnic, or religious networks.¹¹⁵ In fact, English law applied a "strong presumption of fact"—known as the "foreign principal rule"—that only the factor and the buyer would be contractually bound.¹¹⁶ If a principal resided abroad, the principal could neither sue nor be sued on contracts concluded by his English agent.¹¹⁷ In other words, the agent alone was liable to the third party. The foreign principal was assumed not to have authorized or intended his English agent to create contractual privity with a third party in England.¹¹⁸ This presumption applied whether the principal was disclosed or undisclosed. As a presumption, it could be rebutted by clear evidence that there was no intention that the agent be personally liable.¹¹⁹ The presumption therefore "only applied in cases where the parties' intentions were open to doubt."¹²⁰ A presumption to this effect is no longer part of English law.¹²¹ The activities of factors were not limited to foreign trade but additionally extended to domestic sales.

To understand the reasons why a factor would fail to disclose the existence of a principal, consider the model of the contract of sale in use at this time. It was an executed rather than an executory contract. Given that the factor both delivered the goods to the third-party purchaser and collected the purchase price from him, it was largely irrelevant to both parties whether the factor named his principal or not.¹²²

115. This theme is explored by BORIS KOZOLCHYK, *COMPARATIVE COMMERCIAL CONTRACTS: LAW, CULTURE AND ECONOMIC DEVELOPMENT* 783–809 (2014).

116. WATTS & REYNOLDS, *supra* note 5, ¶ 9-020.

117. *Elbinger A G v. Claye* [1873] SCLR 8 (QB) 313. WATTS & REYNOLDS, *supra* note 5, ¶ 8-007; STOLJAR, *supra* note 113, at 238–39.

118. *Elbinger A G v. Claye* [1873] SCLR 8 (QB) 313, per Blackburn, J at 317. WATTS & REYNOLDS, *supra* note 5, ¶ 8-070; MUNDAY, *supra* note 5, ¶ 12.18.

119. WATTS & REYNOLDS, *supra* note 5, ¶ 8-020; MUNDAY, *supra* note 5, ¶ 12.19.

120. MUNDAY, *supra* note 5, ¶ 12.19.

121. *Teheran-Europe Co. Ltd. v. S.T. Belton (Tractors) Ltd.* [1968] (QB) 545. Nevertheless, 20th century English cases indicate that the fact that a principal is foreign may be at least one factor in deciding who the parties intended to be bound in the contract: *Miller Gibb & Co. v. Smith & Tyrer Ltd.* [1917] 2 (KB) 141; *Teheran-Europe Co. v. S T Belton (Tractors) Ltd.* [1968] (QB) 545, per Diplock J at 559. In a modern context, banker's commercial credits perform the same function, providing buyers in international sale of goods contracts with reassurance that the price will be paid.

122. STOLJAR, *supra* note 113, at 205.

B. Expansion and Further Development: Undisclosed Agency

Although views differ on which reported case marks the first recognition of undisclosed agency in English law,¹²³ the legal concept seems to have developed in England in cases during the 18th century.¹²⁴ Samuel Stoljar dates it to the turn of the 18th century.¹²⁵ He emphasizes as important developments the increase in the volume and speed of trade carried out by factors and the fact that factors had begun to sell on credit.¹²⁶ These developments increased the risks for principals. Undisclosed agency allowed a principal, fearing that his agent was about to go bankrupt, to intervene in the agent's contract with the third party to raise an action directly against the third party for the price, or the return of the principal's goods. This is notwithstanding the fact that the undisclosed principal is not a party to that contract. Over time, its use extended beyond the limited context of bankruptcy. In the modern law, the principal can intervene at any time, at his option.¹²⁷

So far, the explanation has focused on the principal's ability to emerge in order to sue the third party directly. The third party's concomitant right to sue the principal emerged later. Whilst Samuel Stoljar suggested that it "appears fully established" in the 18th century,¹²⁸ Gerald Fridman is more cautious, stating that it was "mooted in the latter part of the eighteenth century, and firmly established in the early nineteenth."¹²⁹ A third party would, of course, have to know of the existence of a principal in order to

123. Ames, for example, suggests *Scrimshire v Alderton* (1743) 2 Strange 1182 (*Undisclosed Principal – his rights and liabilities*, 18 YALE L.J. 443, 446 (1909)). In that case, the jury did not allow the undisclosed principal to sue the third party, despite being directed by Lee LJ to do so. Krebs doubts whether this is a true case of undisclosed agency. See Krebs, *supra* note 10, at 164.

124. STOLJAR, *supra* note 113, at 204. According to Müller-Freienfels, there "is no clear reported case of an undisclosed principal before the eighteenth century." W. Müller-Freienfels, *The Undisclosed Principal*, 16 MOD. L. REV. 299, 302 (1953).

125. STOLJAR, *supra* note 113, at 205–06. Stoljar identifies the following cases as the earliest instances of intervention by undisclosed principals: *Burdett v Willett* (1708) 2 Vern 638; *L'Apostre v Le Plaistrier* (1708) 1 P. Wms. 314, 318; *Copeman v Gallant* (1716) 1 P. Wms. 314; *Godfrey v Furzo* (1733) 3 P. Wms. 185; *Whitecomb v Jacob* (1709) 1 Salk. 160. *Id.* at 206 n.18

126. See *supra* note 113.

127. WATTS & REYNOLDS, *supra* note 5, ¶ 8-071.

128. STOLJAR, *supra* note 113, at 210.

129. Fridman, *supra* note 111, ¶ 5.03 (citing, from the early 19th century, *Thomson v. Davenport* [1829] 9 B & C 78; *Cothay v. Fennell* 109 ER 599; [1830] 10 B & C 671).

sue him. The principal is unlikely to emerge unless it is in her interests to do so. For this reason, perhaps, there are fewer examples in reported cases of litigation initiated by third parties. The third party tends to raise a claim as a response to a claim raised against him by the principal.

C. Unidentified Agency

If the agent makes clear her status as agent but does not name her principal, the law classifies this as “unidentified” rather than undisclosed agency. In undisclosed agency, the third party has no idea that there is a principal; in unidentified agency, the third party knows that there is a principal but does not know who that principal is. Although English courts have not always clearly separated undisclosed from unidentified agency, they are distinct ideas with distinct rules.¹³⁰ If the agent acts for an unidentified principal, English law treats the situation as a type of disclosed agency and, as such, follows the normal rules of disclosed agency.¹³¹ The agent creates a direct contract between the principal and third party. This scenario can be contrasted with undisclosed agency, where the agent creates a contract which binds him personally to the third party, although the principal can later step in to that contract in order to sue the third party. The English approach to unidentified agency follows a certain logic: the third party is aware that there is a principal and is presumably happy to form a contract with that principal, whomever she may be. This is in distinct contrast to undisclosed agency, in which the third party is completely unaware that a principal exists.

V. UNDISCLOSED AND UNIDENTIFIED AGENCY IN THE UNITED STATES

This Part identifies the first appearance of undisclosed agency in major United States treatises on the law of agency. The aim is to provide a backdrop for consideration of the development of undisclosed agency in Louisiana law. *Williams v. Winchester*,¹³² discussed below, decided in 1828, is usually identified as the first Louisiana case to recognize undisclosed agency. There are no direct references in the report of that case to the law in other states. This Part aims to identify what, in terms of contemporary United States agency scholarship, was available to the Louisiana judges deciding the first Louisiana undisclosed agency case.

130. Francis M.B. Reynolds, *Unidentified Principals in the Common Law*, in AGENCY LAW AND COMMERCIAL PRACTICE ¶ 4.02 (Danny Busch, Laura Macgregor & Peter Watts eds., 2016).

131. WATTS & REYNOLDS, *supra* note 5, ¶ 1-037.

132. *Williams v. Winchester*, 7 Mart. (n.s.) 22 (La. 1828).

The factor was significant not only in English trade, but also in trade in the United States. Roderick Munday suggested that, by the 18th century, factors were established along the eastern seaboard,¹³³ and indeed played a “vital financial function” in the United States generally.¹³⁴ If one considers the economic benefits factors offered, it is easy to understand why they played such a vital function in the United States at the time. For buyers or sellers of goods located in the United States, the factor acted as a local trusted contracting party. Just as in England, so too in the United States, contracting with a factor would have involved less risk than contracting with an unknown foreign party. Munday explained the high dependence of manufacturers on factors by reference to the “great distances separating the seller and the buyer both within and without the United States,” and the slowness of communications.¹³⁵

The major United States treatises on agency appeared during the 19th century. Story’s *Commentaries on the law of agency* appeared in first edition in 1839,¹³⁶ and Mechem’s *Treatise on the law of agency* appeared in 1889.¹³⁷ Story in his discussion of undisclosed agency refers to English treatises—Paley, Chitty, Smith¹³⁸—but also to one U.S. treatise, written by Samuel Livermore in 1818.¹³⁹ Livermore’s work contains a discussion of undisclosed agency, written in basic terms, referring to one of the earliest English cases, *Scrimshire v Alderton*.¹⁴⁰

The history of undisclosed agency in English law is bound up with the history of factors acting for foreign principals. Factors were presumed not to form direct contracts between their principal and a third party resident abroad. The development of undisclosed agency allowed the principal to

133. Munday, *supra* note 14, at 251.

134. *Id.* at 260.

135. *Id.* at 251.

136. JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY AS A BRANCH OF MERCANTILE JURISPRUDENCE WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW (1851).

137. FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY: INCLUDING NOT ONLY A DISCUSSION OF THE GENERAL SUBJECT, BUT ALSO SPECIAL CHAPTERS ON ATTORNEYS, AUCTIONEERS, BROKERS AND FACTORS (1st ed. 1889).

138. STORY’S COMMENTARIES § 266 (1839). The editions referred to are likely to be: WILLIAM PALEY, A TREATISE ON THE LAW OF PRINCIPAL AND AGENT CHIEFLY WITH REFERENCE TO MERCANTILE TRANSACTIONS (John H. Lloyd ed., 3d. ed. 1833); JOSEPH CHITTY, A TREATISE ON THE LAWS OF COMMERCE AND MANUFACTURES (1824); JOHN W. SMITH, A COMPENDIUM OF MERCANTILE LAW (2d. ed. 1838).

139. SAMUEL LIVERMORE, TREATISE ON THE LAW OF PRINCIPAL AND AGENT (2d ed. 1818).

140. *Id.* at 281–82 (referring to *Scrimshire v. Alderton* [1743] 2 Strange 1182).

intervene on those contracts. The early United States treatises analyze the foreign principal rule. Story's first edition notes the presumption that credit is given to the factor and that the factor is dealt with as a principal.¹⁴¹ It contains, however, only isolated references to, rather than a comprehensive treatment of, undisclosed principals.¹⁴² He cited both English treatises and case law.¹⁴³ By the time of Mechem's first edition in 1889, the concept appears to have developed significantly. He analyzed the law relating to factors in a specific chapter,¹⁴⁴ noting the factor's ability to sell in his own name.¹⁴⁵ The treatise fully analyzed the fundamental characteristics of undisclosed agency, both from the perspective of the agent¹⁴⁶ and of the principal.¹⁴⁷

Of all the U.S. treatises on agency, only Livermore's would have been available to the Louisiana Supreme Court deciding *Williams v. Winchester*.¹⁴⁸ Livermore's treatise appeared in two editions, the second published in Baltimore in 1818. He was, however, living in New Orleans at that time: a search of Martin's reports reveals his appearance as an attorney in cases going as far back as 1819.¹⁴⁹ Looking at contemporary developments in the United States beyond simply agency treatises, the existence of codes enacted by the southern states is potentially relevant. Leaving aside the Louisiana Code, considered below, the California Code is drafted in language which accommodates undisclosed agency.¹⁵⁰ It is, however, much later in date, becoming effective in 1873.¹⁵¹ It can be concluded that undisclosed agency emerged in Louisiana law at an early stage, considered against the backdrop of legal developments in agency law in the United States during the 19th century.

141. STORY, *supra* note 136, § 290.

142. *Id.* § 396.

143. *Id.* §§ 393, 396 n.1 (citing CHITTY, TREATISE ON THE LAWS OF COMMERCE AND MANUFACTURES; PALEY, TREATISE ON THE LAW OF PRINCIPAL AND AGENT; and two cases: *Leeds v. the Marine Insur Com*, 6 Wheat 565 and *Sims v. Bond*, 3 Barn & Adolph 393).

144. MECHEM, *supra* note 137, at Book V, Chap. IV, "Of factors."

145. *Id.* § 991.

146. *Id.* §§ 554–55.

147. *Id.* §§ 696–702.

148. *Williams v. Winchester*, 7 Mart. (n.s.) 22 (La. 1828).

149. He continued to live in New Orleans until his death in 1833.

150. CAL. CIV. CODE § 2330 (2019). Undisclosed agency is not, it seems, antagonistic to Codes. The author is grateful to Professor Deborah DeMott for drawing her attention to this example.

151. *Id.*

VI. UNDISCLOSED AND UNIDENTIFIED AGENCY IN LOUISIANA LAW

This Part explores the development of undisclosed and unidentified agency in Louisiana law, drawing both on the Digest or Code of 1808 and on developments taking place in case law. It ends with consideration of Revision of Title XV of the Code, Representation and Mandate, in 1997.

A. *The Louisiana Digest or Civil Code of 1808*

Before considering the relevant provisions of the Louisiana Digest of 1808, it is helpful to describe the contract of mandate in Roman law, from which both Louisiana and Scots law ultimately derive. In Roman law, mandate was a gratuitous contract entered into between friends and social equals.¹⁵² Roman law did not recognize direct representation, that is the ability of the mandatary or agent to form contracts directly between his mandant or principal and third parties. Whilst this has led some to describe mandate in Roman law as a “very imperfect form of agency,”¹⁵³ others have noted that different concepts were used as functional equivalents of agency, rendering the development of direct representation unnecessary.¹⁵⁴

The English translation of the Digest of 1808 states, under the heading, “Of Mandate or Commission,” “[a] procuration or letter of attorney is an act by which one person gives power to another to transact for him one of several affairs.”¹⁵⁵ This appears to omit a requirement to act in the name of a principal, a key requirement in the civil law. There appears, however, to have been an error in translation. The French authoritative¹⁵⁶ version states: “Le mandat ou procuration, est un acte par lequel quelqu’un donne pouvoir à un autre, de faire pour lui *et en son nom*, une ou plusieurs affaires.”¹⁵⁷ The omission from the English translation of the crucial words, “in the name of,” has not, as far as the author is aware, been

152. REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 424 (1996).

153. Raphael Powell, *Contractual Agency in Roman Law and English Law*, S. AFR. L. REV. 41, 42 (1956).

154. WILLIAM M. GORDON, *ROMAN LAW, SCOTS LAW AND LEGAL HISTORY* 54 (2007), *first published in* 3 *STUDI IN ONORE DI C SANFILIPPO* 345 (1983).

155. *Id.* tit. XIII, ch. 1, art. 1.

156. “[T]he English version was merely a translation from the French original.” A.N. Yiannopoulos, *The Civil Codes of Louisiana*, 1 CIV. L. COMMENTARIES 7 (2008).

157. *Id.* (emphasis added). It is suggested that the correct English translation would be: “[a] procuration or letter of attorney is an act by which one person gives power to another to transact for him *and in his name* one of several affairs.” *Id.* (emphasis added).

discussed in Louisiana scholarship. Did the translator omit these crucial words because he was more in tune with the common law, translating what he expected to read? The English translation was corrected in the Code of 1825, the words, “for him and in his name” appearing for the first time.¹⁵⁸ Acceptance by the other person perfected this act into a contract.¹⁵⁹ These provisions are reflective of article 1984 of the French Code Napoléon, without being an exact copy.¹⁶⁰ They appear to follow the wording of the *Projet* of 1800, which preceded enactment of the Code Napoléon, rather than the Code itself.

A relevant French concept is not present in the Digest of 1808: the French *prête-nom*. In French law, where the principal hides his existence, this is treated as part of the law of simulation—also known as *contre-lettre*—and the third party is provided with a direct action against the principal, but not vice versa.¹⁶¹ The French *prête-nom*, which recognizes only one direct action, can be contrasted with undisclosed agency in the common law, the latter allowing the principal to sue the third party *and* the third party to sue the principal. The lack of the *prête-nom* left something of a *lacuna* in Louisiana law.

The specifically contractual nature of mandate did not change on further revision of the Code in 1870.¹⁶² This contractual nature is

158. LA. CIV. CODE art. 2954 (1825): “A procuration or letter of attorney is an act by which one person gives power to another to transact for him and in his name, one of several affairs.”

159. LA. CIV. CODE tit. XIII, ch. 1, art. 2 (1808).

160. John D. Wogan, *Agency Power in Louisiana*, 40 TUL. L. REV. 110, 112 (1965); Thomas P. LeBlanc, *Woodlawn Park Ltd. v. Doster Construction Company, Inc.: Disclosing Undisclosed Agency Law in Louisiana*, 54 LA. L. REV. 1395, 1401 (1994); North, *supra* note 43, at 290.

161. In the modern law, the *prête-nom* is treated as being contractually bound to the third party (Cass Com 26/04/1982, D 1986, 233) even if the third party knew that the *prête-nom* was in fact a *prête-nom*—i.e., was an artifice—unless he himself knew about the simulation and was party to it (Civ 3eme, 8 July 1992, JCP 1993, II 21982). *See also* the *contre-lettre*, CODE CIVIL [C. CIV.] art. 1201 (Fr.): “Where the parties have concluded an apparent contract which conceals a secret contract, the latter (also called a ‘counter-letter’) takes effect between the parties. It cannot be set up against third parties, though the latter may rely on it.” *See also* C. CIV. art. 1202.

162. LA. CIV. CODE art. 2988 (1870); LA. CIV. CODE art. 2989 (1997): “A mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal.” 1997 La. Acts 412.

something which Louisiana law shares with Scots law and can be contrasted with the common law tradition.¹⁶³

The mandate provisions of the Digest of 1808 assume a gratuitous, rather than a non-gratuitous, relationship, although the parties could agree otherwise.¹⁶⁴ Boris Kozolchyk described the legal tradition within which Louisiana law can be placed at this time:

[T]he drafters of the nineteenth century French and Spanish Civil Codes were not fully convinced of the benefits of commercialization and thus retained the Roman characterization of the contract of agency (*mandatum*) as gratuitous service to another, regardless of how necessary such intermediary services were in business transactions.¹⁶⁵

The Digest of 1808 also failed to focus on the ability of the person empowered to act on behalf of the principal to create contracts for that principal. This is not surprising given that the mandate provisions are based on article 1984 of the French Code Civil, which also failed to make clear the relationship between mandate, on the one hand, and representation on the other.¹⁶⁶ Kozolchyk described civilian mandate as “impracticable”¹⁶⁷ for modern business. Similarly, Jana Grauberger, speaking of the mandate provisions of the early Louisiana Civil Code, described them as “inadequate to handle many everyday problems.”¹⁶⁸ Only on revision in 1997 was a concept termed “representation” introduced into the Civil Code.¹⁶⁹ This late appearance of representation is misleading, however. According to Holmes and Symeonides, the revision simply renamed a concept that “has always existed.”¹⁷⁰ This theme—failure of black letter law to reflect the law in practice—reappears below. The following Parts probe the possibility that not only representation, but also a form of undisclosed agency, may have existed in Louisiana law despite its absence from the Civil Code before 1997.

163. See *infra* Part VII.A.

164. LA. CIV. CODE tit. XIII, ch. 1, art. 5 (1808).

165. KOZOLCHYK, *supra* note 115, at 95.

166. Athanassios N. Yiannopoulos, *Brokerage, Mandate and Agency in Louisiana Law: Civilian Tradition and Modern Practice*, 19 LA. L. REV. 777, 782–85 (1959).

167. KOZOLCHYK, *supra* note 115, at 425.

168. Jana L. Grauberger, *From Mere Intrusion to General Confusion: Agency and Mandate in Louisiana*, 72 TUL. L. REV. 257, 266 (1997).

169. LA. CIV. CODE art. 2985 (2019).

170. Holmes & Symeonides, *supra* note 44, at 1091.

B. Trading Conditions in the 19th Century

Even before the Louisiana Purchase in 1803, a large volume of American trade flowed through Louisiana.¹⁷¹ Because Louisiana had been underpopulated, the Spanish government had encouraged Americans to settle there, so much so that Americans came to “dominate economic life” there.¹⁷² After the Louisiana Purchase, this trade increased.¹⁷³ It is likely that traders from other states, whether seeking to trade in Louisiana temporarily or to relocate there permanently, would begin to apply methods of trading with which they were familiar, undisclosed agency potentially being one of them.

Richard Kilbourne’s work on the role of the factor illustrates how crucial that economic actor was to the Louisiana economy in the 19th century. He stated: “[T]he exclusive form of business was factorage.”¹⁷⁴ The factor often chose the business vehicle of commercial partnership in order to trade.¹⁷⁵ It was common to transact business not in the name of the principal, but rather in the name of the factor, or trading house.¹⁷⁶ The importance of the factor can be explained, at least in part, by the factor’s role as a lender. Factors provided private investment banking facilities in Louisiana at this time, facilitating the smooth operation of the economy.¹⁷⁷ Wealthy clients banked with factors because of the higher rates of interest they offered in comparison to banks, and made large deposits with their factors; these sums were then available for more general lending.¹⁷⁸ Those clients, the principals, often did not reside in Louisiana, a fact ascribed to the “insalubrity of the climate.”¹⁷⁹ The finance factors provided was both short-term and long-term on unsecured commercial paper.¹⁸⁰ Long-term finance was important if one takes into account the highly seasonal nature of the trade in Louisiana, resting mainly on production of cotton. Factors

171. JOHN W. CAIRNS, *CODIFICATION, TRANSPLANTS AND HISTORY LAW REFORM IN LOUISIANA (1808) AND QUEBEC (1866)* 21 (2015).

172. *Id.*

173. John T. Hood, Jr., *The History and Development of the Louisiana Civil Code*, 19 LA. L. REV. 18 (1958).

174. KILBOURNE, JR., *supra* note 55, at 108–09.

175. *Id.* at 115.

176. *Id.* at 65 (citing *Ward v. Brandt*, 11 Mart. (o.s.) 331 (La. 1822)).

177. RICHARD H. KILBOURNE, JR., *The Emergence of Factors as Investment Bankers*, in *DEBT, INVESTMENT, SLAVES CREDIT RELATIONS IN EAST FELICIANA PARISH, LOUISIANA 1825-1885* 26 (1995).

178. *Id.* at 42, 45.

179. KILBOURNE, JR., *supra* note 55, at 109 (quoting *Ward v. Brandt*, 11 Mart. (o.s.) 331 (La. 1822)).

180. KILBOURNE, JR., *supra* note 177, at 4.

provided many services for clients, including the sourcing of loan facilities offered by third parties. They were often integral in the purchase and sale of slaves.¹⁸¹ After the civil war, slave emancipation played a major part in the collapse of this part of the economy; 90% of the factorage firms failed, either during the war or within the succeeding decade.¹⁸²

Richard Kilbourne's work presents a picture of a highly sophisticated economy. Factors were operating much like a modern private investment bank. This casts an intriguing light on the "impracticable" mandate provisions of the Digest of 1808: they seem inadequate to support factors' activities. This raises the possibility that undisclosed agency might have been present in Louisiana at this time, even if not referred to in the Civil Code. As factors became lenders, the risk of their bankruptcy increased. Undisclosed agency would have provided principals with important protections from a factor's bankruptcy.

Social conditions existing in New Orleans at this time may have encouraged individuals to use agents to conceal their identities. Powell suggested that smuggling was a way of life in New Orleans in the 18th century, stating "[a]ll the town's pillars of respectability" joined in the contraband trade.¹⁸³ He continued: "Intermediaries, often widows, sisters, wives, or daughters, masked the retail side of trade by handling the smuggled merchandise on consignment. To get around the ban against nobles' engaging in merchandising, *les grands* hired *les petits* to handle the consignment in their stead."¹⁸⁴

Thus, individuals may have concealed their identities in order to trade, even if that trade was part of an illegal enterprise. In legitimate contracting too, concealing identity may have been a necessity for certain parts of the population. Powell suggests that women, generally active in trade, concealed their identity through the use of intermediaries.¹⁸⁵ Slaves and free persons of color were also, as a general rule, active traders. Whilst free persons of color had no restrictions on their capacity to contract,¹⁸⁶ slaves did. These sections of the population may have made use of factors to conceal their identities in order to trade. According to Powell, the people of

181. *Id.* at 39.

182. *Id.* at 7.

183. LAWRENCE N. POWELL, *THE ACCIDENTAL CITY: IMPROVISING NEW ORLEANS* 104 (2012).

184. *Id.* at 104.

185. *Id.* at 111.

186. GEORGE DARGO, *JEFFERSON'S LOUISIANA POLITICS AND THE CLASH OF LEGAL TRADITIONS* 11 (rev. ed. 2009).

New Orleans “were reinventing themselves with the ease of chameleons, overturning hierarchies fixed by custom, law, and providence.”¹⁸⁷

Trading in this way did not necessarily involve a greater degree of risk for the third party; the third party can benefit from undisclosed agency: she finds that she has an alternative debtor to the agent. If factors in Louisiana at this time were so financially dominant, third parties would not be concerned about the existence of an undisclosed principal. The agent has a good financial reputation, and, if there is an undisclosed principal, this means that the third party has the protection of an extra possible debtor.

These ideas are put forward as suggestions only. The author has been unable to find hard evidence that undisclosed agency was taking place in Louisiana at this time. It has already been concluded, against the backdrop of the U.S. Treatises on Agency, that undisclosed agency emerged in the Louisiana courts at an early stage. It seems highly likely that the concept existed in practice before precedents from the common law became available to the Louisiana courts.

C. Case Law: The Swing of the Pendulum Between the Civil and the Common Law

This Part examines Louisiana cases in which a reception of common law undisclosed agency takes place. As suggested above, undisclosed agency probably existed in practice before the Louisiana Supreme Court recognized in 1828 in *Williams v. Winchester*.¹⁸⁸ Thus, the reception discussed here is the adoption of common law precedents to rename a concept that was probably already in existence.¹⁸⁹

In *Williams v. Winchester*, the court held that a third party could hold a principal, once disclosed, liable for the price of goods sold to an agent. The Supreme Court appears not to have relied on the Civil Code provisions on mandate, nor on any civilian source. Instead, the court used common

187. POWELL, *supra* note 183, at 121.

188. *Williams v. Winchester*, 7 Mart. (n.s.) 22 (La. 1828).

189. This phenomenon is recognized by Alan Watson: “[J]urists at times exaggerate the extent of a transplant. Often the host system had a similar rule and little of importance was received apart from terminology.” WATSON, *supra* note 15, at 97.

law terminology,¹⁹⁰ English cases,¹⁹¹ and Livermore's Treatise.¹⁹² The fact that Livermore was a resident of New Orleans at this time was noted above.¹⁹³ The Supreme Court cited his treatise in other agency cases.¹⁹⁴ His works, those of a local author who was also appearing in the Louisiana courts at the time, are likely to have been an attractive resource for the court.

Despite this case being generally recognized as the first on *undisclosed* agency, it seems to involve *unidentified* agency. The third party was aware that a principal existed but did not know who that principal was. In undisclosed agency, both the fact of agency and the identity of the principal are unknown to the third party. According to the case report, the agents in question stated in a letter: "A friend of ours, a sugar planter, wishes to procure from your city a set of sugar kettles."¹⁹⁵ The existence of a principal is thus made clear to the third party. Confusion between undisclosed and unidentified agency is relatively common in other legal systems.¹⁹⁶ Subsequent courts "fell into line" with this decision.¹⁹⁷ Later cases developed the concomitant right of the undisclosed principal to sue the third party.¹⁹⁸

After *Williams v. Winchester*, the law as applied in the Louisiana courts became inconsistent with the Civil Code. Litigants sought to challenge the validity of the concept, most notably in 1947 in the Supreme Court case, *Sentell v. Richardson*.¹⁹⁹ Chief Justice O'Neill stated:

Our opinion is that the words "and in his name" are not essential

190. Fred W. Jones, *Juridical Basis of Principal-Third Party Liability in Louisiana Undisclosed Agency Cases*, 8 LA. L. REV. 409, 412 (1948).

191. 1 Campbell, NP 85; 4 Taunton 576, n.15 East, 65; SAMUEL LIVERMORE, TREATISE ON THE LAW OF PRINCIPAL AND AGENT 199, 200 (2d ed. 1818).

192. LIVERMORE, *supra* note 191, at 199–200.

193. *See infra* Part V.

194. Ward v. Brandt, 11 Mart. (o.s.) 331 (La. 1822); McNeil v. Coleman, 8 Mart. (o.s.) 373 (La. 1820).

195. Williams v. Winchester, 7 Mart. (n.s.) 22, 24 (La. 1828).

196. MUNDAY, *supra* note 5, ¶ 10.30–10.31.

197. North, *supra* note 43, at 295. Carlisle v. Steamer Eudora & Owners, 5 La. Ann. 15 (1850); Ballister v. Hamilton, 3 La. Ann. 401 (1848); Valmont Serv. Station v. Avegno, 3 La. App. 335 (Orl. 1925); Johnston v. Bisso Tow-Boat Co., 1 Pelt. 75 (La. Ct. App. 1918); Grimaldi & Co. v. Sbisa, 10 Teiss. 176 (La. Ct. App. 1913).

198. De Soto Building Co. Ltd. v. Kohnstamm Orleans, 3 Pelt. 54, 62 (La. Ct. App. 1919); Childers v. Police Jury of Par. of Ouachita, 121 So. 248 (La. Ct. App. 1928).

199. Sentell v. Richardson, 29 So. 2d 852 (La. 1947).

to the definition of a procuration or power of attorney, as defined in article 2985 of the Civil Code. If those words were essential to the definition *there could be no such thing* as a procuration or power of attorney to buy property for an undisclosed principal.²⁰⁰

The Chief Justice appears to reason from the practical existence of the concept that it must be legally valid. The existence, in fact, led him to conclude that the words “in the name of” in the Civil Code were not essential. The court struggles with competing policies: commercial expediency—undisclosed agency, against formal transparency—and disclosed agency. *Sentell* has been described as a “ringing reaffirmation of undisclosed agency theory as a basic principle of Louisiana agency law,”²⁰¹ and as amounting to judicial amendment of the Code.²⁰²

A further challenge to the concept took place in 1983 in *Teachers’ Retirement System v. Louisiana State Employees Retirement System*.²⁰³ The Louisiana First Circuit Court of Appeal sought to return Louisiana agency law to the civilian approach, holding that the undisclosed principal had no right to sue a party with whom his agent had transacted. Referring to the Civil Code provisions on mandate,²⁰⁴ the Court quite accurately stated: “Nowhere in these articles do we find authority for an undisclosed principal suing a third person on a contract made by an agent. In fact, ‘undisclosed agency’ is not recognized at all by the code.”²⁰⁵

Referring to Planiol’s Civil Law Treatise,²⁰⁶ the court noted the distinction in French law between mandate, on the one hand, and *prête-nom* or commission, on the other. The court concluded: “[U]nder the civil law tradition, Great American (the agent) was a ‘*prête-nom*’ who acted in its own behalf as opposed to representing itself to be acting for the other principals. As such, only Great American has a right of action against West Side.”²⁰⁷

200. *Id.* at 855 (emphasis added).

201. Holmes & Symeonides, *supra* note 44, at 1140.

202. Robert A. Pascal, *Civil Code and Related Subjects, Agency. The Work of the Louisiana Supreme Court for the 1946-1947 Term*, 8 LA. L. REV. 223, 224 (1948); North, *supra* note 43, at 296.

203. *Teachers’ Ret. Sys. v. La. State Emps. Ret. Sys.*, 444 So. 2d 193 (La. Ct. App. 1983), *rev’d on other grounds*, 456 So. 2d 594 (La. 1984).

204. *See generally* LA. CIV. CODE arts. 2985–3034 (2019).

205. *Teachers’ Retirement*, 444 So. 2d at 196.

206. MARCEL PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL*, pt. 2, no. 2271, 303 (11th & 12th eds. 1938 & 1939) (La. State Law Inst. trans., 1959).

207. *Teachers’ Retirement*, 444 So. 2d at 196–97.

The court classified Louisiana law as part of the civil law tradition, and thereby refused the undisclosed principal an action. This approach is questionable: the French *prête-nom* was not adopted into the Louisiana Civil Code. Previous Louisiana case law on undisclosed agency was dismissed as “older appellate decisions.” Judging from the case report, there appears to have been no reference to *Sentell*. On appeal, the Supreme Court reversed the decision on procedural grounds and the undisclosed principal point was not reconsidered. Less than a year later, the First Circuit recognized the right of a third party to sue an undisclosed principal.²⁰⁸ Although the court in the case in question discussed neither *Sentell* nor *Teachers*, the terminology of undisclosed agency—“undisclosed agent” and “undisclosed principal”—was used by the court.

The desire to return Louisiana law to its civilian roots had not entirely disappeared, however. The First Circuit denied the undisclosed principal the right to sue once more in *Woodlawn Park Ltd. Partnership v. Doster Construction Co.*, in 1992.²⁰⁹ The decision was overturned on appeal to the Supreme Court, Justice Lemmon stating:

The Civil Code has never fully developed the concept of agency and representation with respect to the direct acquisition of rights and liabilities through the contractual action of a properly authorized intermediary who may or may not disclose his representative capacity. . . . However, Louisiana courts, perhaps recognizing that agency as a field of commercial law should be uniform throughout the country, have adopted notions of common law agency. . . . We restate approval of common law agency notions in commercial transactions. In matters of commercial law, Louisiana has frequently taken steps to make our law uniform with other states.²¹⁰

A significant issue for the court in *Woodlawn* was the fact that there would be no prejudice to the third party in allowing a direct action by the undisclosed principal. The third party was, after all, being called upon to perform the very contract into which he originally entered. The only difference to the third party is the change of party to whom he must perform.

208. *Frank's Door & Bldg. Supply Co. v. Double H Constr. Co.*, 459 So. 2d 1273 (La. Ct. App. 1984).

209. *Woodlawn Park Ltd. P'ship v. Doster Constr. Co.*, 602 So. 2d 1029 (La. Ct. App. 1992), *rev'd*, 623 So. 2d 645 (La. 1993).

210. *Woodlawn Park*, 623 So. 2d at 657–58 (citations omitted).

The Supreme Court characterized its method as developing an area in which the Civil Code was silent. Where a gap exists, recourse to the common law would be justifiable.²¹¹ The Civil Code was not, however, silent—it provided that the mandatary must act *in the name of* the principal. There is no ambiguity in that article. Rather than a gap, the more logical conclusion is that the situation is not mandate, the agent having failed to act in the name of the principal, and that no direct action could therefore be possible.

The practical effect of the Supreme Court's approach has been broadly welcomed by Louisiana authors as,²¹² for example, a "step forward for Louisiana commercial law."²¹³ The judicial method used has, however, been universally criticized.²¹⁴ Although the courts had overcome the unsatisfactory terms of the Civil Code, the need for revision of the Code was, by the late 20th century, pressing.

D. Revision of the Code, 1997

Revised article 2985 defines representation, as opposed to mandate, for the first time: "A person may represent another person in legal relations as provided by law or by juridical act. This is called representation." A new definition of mandate appears in article 2989. Crucially, the requirement that the agent act *in the name of* the principal was removed. The new text reads: "A mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal."

After revision, the first overt references in the Civil Code to the concept of undisclosed and unidentified agency appear. Article 3017, entitled, "Undisclosed mandate," states: "A mandatary who contracts in his own name without disclosing his status as a mandatary binds himself personally for performance of the contract." The Revision Comments state that this new provision is based in part on article 3013 of the Louisiana Civil Code of 1870 and article 2157 of the Québec Civil Code.²¹⁵ The reference to the Québec Civil Code is interesting; the Revision Committee chose to use undisclosed agency in another mixed legal system as inspiration. There is no reference to the common law.

211. PALMER, *supra* note 19, at 66–67.

212. Jones, *supra* note 190, at 414; LeBlanc, *supra* note 160, at 1405.

213. North, *supra* note 43, at 299.

214. Jones, *supra* note 190, at 410; Pascal, *supra* note 202, at 224; LeBlanc, *supra* note 160, at 1411, 1418; Graubeger, *supra* note 168, at 268.

215. The source is provided as Civil Code articles 3012–13 (1870); Civil Code of Québec arts. 2157 and 2159.

Article 3023, entitled, “Undisclosed mandate or principal; obligations of third person,” provides:

A third person with whom a mandatary contracts without disclosing his status or the identity of the principal is bound to the principal for the performance of the contract unless the obligation is strictly personal or the right non-assignable. The third person may raise all defenses that may be asserted against the mandatary or the principal.

The Revision Comments state that article 3023 is new.

Through the combined operation of these articles, the third party appears to be bound to both principal and mandatary at the same time. This position can be contrasted with versions of the undisclosed principal found in English or Scots law. Undisclosed agency in these latter systems involves the formation of a direct contract between agent and third party, which the principal, at his option, can step into to raise an action against the third party. There is, however, only one contract; the only question is which of two possible parties—the principal or the agent—is bound to the third party in that contract. The liability of the principal and the agent is described, in Scots law, as “alternative.”²¹⁶

Unidentified agency describes the situation in which the agent discloses the fact that she is an agent but conceals the name of the principal. It can be contrasted with undisclosed agency, where the existence of the principal—and indeed the fact that the agent is an agent—is concealed. In unidentified agency, the third party knows that there is a principal, but she does not know who that principal is. Unidentified agency is governed by new article 3018, entitled “Disclosed mandate; undisclosed principal,” which provides: “A mandatary who enters into a contract and discloses his status as a mandatary, though not his principal, binds himself personally for the performance of the contract. The mandatary ceases to be bound when the principal is disclosed.”²¹⁷ The Revision Comments state that this provision is new, and no source is given. Article 3022, entitled “Disclosed mandate or principal, third person bound” provides: “A third person with whom a mandatary contracts in the name of the principal, or in his own name as mandatary, is bound to the principal for the performance of the contract.”²¹⁸

In unidentified agency, as was the case in undisclosed agency, the Civil Code appears to set up dual liability: the third party is bound to both

216. MACGREGOR, *supra* note 62, ¶¶ 12–25.

217. LA. CIV. CODE art. 3018 (2019).

218. *Id.* art. 3022.

agent and principal. By contrast to undisclosed agency, however, in unidentified agency, the agent is given an escape route. Naming the principal absolves the agent of liability.

The Louisiana Second Circuit Court of Appeal confirmed that the agent bears the burden of proving that she disclosed his agency status and the identity of the principal if she wants to avoid personal liability.²¹⁹ Express notice of the agent's status and the principal's identity is not required if the agent proves that the third party knew of sufficient evidence of the agency relationship so as to put her on notice of the agency relationship. The Louisiana First Circuit Court of Appeal also considered the way in which the agent's representative capacity can be disclosed, suggesting that disclosure need not be express, but rather that certain indicia of agency may be present and proved as an issue of fact.²²⁰

Article 3018 is of particular interest because, as explored below, it is very similar to modern Scots law. It differs from the equivalent provision of the Restatement (Second) Agency, in force at the time of Revision of the Louisiana Code.²²¹ Under the Restatement, the agent remains a co-obligor even after the principal becomes disclosed, unless there is specific agreement to the contrary. Thus, Louisiana law is more favorable towards the agent than the Restatement, providing the agent with a route for "automatic absolution."²²² The Revision Comments do not suggest a source for article 3018. The current author has, however, had access to the Minutes of the Revision Committee.²²³ The Minutes disclose that a majority of the Committee favored a rule in terms of which the mandatary was not bound by the contract but warranted both his authority and the existence of his principal. The Reporter, Professor Yiannopoulos, considered this solution to be "harsh" and suggested two alternatives.²²⁴

219. *Rodgers v. N. La. Amusement & Gaming, L.L.C.*, 56 So. 3d 289, 291 (La. Ct. App. 2010), *writ denied*, 58 So. 3d 481 (La. 2011).

220. *GWS Engineering, Inc. v. Gomez*, 135 So. 3d 71 (La. Ct. App. 2013).

221. RESTATEMENT (SECOND) OF AGENCY § 321 cmts. a, b. It remains different from the more recent version, RESTATEMENT (THIRD) OF AGENCY § 6.02. The text of § 6.02 is as follows: "When an agent acting with actual or apparent authority makes a contract on behalf of an unidentified principal, (1) the principal and the third party are parties to the contract; and (2) the agent is a party to the contract unless the agent and the third party agree otherwise." *Id.*

222. *Holmes & Symeonides*, *supra* note 44, at 1143.

223. The author wishes to express her sincere thanks to Professor Ron Scalise of Tulane University for sending copies of the Minutes to her.

224. These suggestions were made in a document prepared for the Committee on August 25, 1995 (5, 6) considered at the Committee Meeting on September 15 and 16, 1995.

The first alternative was to absolve the mandatary on naming the principal, and this was adopted as the final text of article 3018.²²⁵ The second would have seen the mandatary liable only if he promised to name the principal and failed to do so. Clearly, the more lenient approach of Louisiana law exists thanks to the persuasive talents of Professor Yiannopoulos.

Article 3018 is strikingly similar to two modern European codification initiatives: the Principles of European Contract Law (“PECL”);²²⁶ and the Draft Common Frame of Reference (“DCFR”).²²⁷ The general effect of the PECL and the DCFR is to place a duty on the agent to name the principal if asked, and to hold the agent liable to the third party if he fails to do so. Under the PECL, the agent who fails to reveal is bound by the contract. Under the DCFR, the agent who fails to do so is treated as having acted “in a personal capacity.” In both cases, the agent becomes a party to the contract and is under a duty to name the principal. Revision of these articles of the Louisiana Civil Code postdates the PECL but predates the DCFR. A document containing comparative material was placed before the Committee, in essence mandate provisions from Greece, Germany, Italy, and the Netherlands.²²⁸ Thus, article 3018 is inspired by the civil law and was formed under the hand of one of Louisiana’s greatest civilians, Professor Yiannopoulos.

Louisiana law, the PECL, and the DCFR can be contrasted in this respect with English law. In that system, only the principal is bound, and there is nothing to prevent the principal and agent from keeping the principal unidentified for as long as they want: there is no duty to identify the principal.

Holmes and Symeonides were critical of new article 3018: “This is a rather peculiar rule, one which differs both from the common law and the pre-Revision jurisprudence, and may represent one of the least successful choices made in the Revision.”²²⁹

Holmes and Symeonides suggest that this approach tends to promote opportunistic behavior on the part of the agent. The agent may conclude a contract in a representative capacity, making that representative capacity clear, but having no clear view which principal will ultimately be the

225. Minutes of the Mandate Committee Meeting, September 15, 1995, 8.

226. PECL (2000), art 3:203.

227. DCFR II. – 6:108 provides: “If a representative acts for a principal whose identity is to be revealed later, but fails to reveal that identity within a reasonable time after a request by the third party, the representative is treated as having acted in a personal capacity.”

228. These were provided to the Committee in a separate document dated November 15, 1993.

229. Holmes & Symeonides, *supra* note 44, at 1142–43.

beneficiary of that contract. This undermines certainty and conflicts with the general rule in undisclosed agency that there must be an actual principal in place before the agent contracts with the third party. Reynolds has expressed similar concerns in relation to English law.²³⁰ Although there is no evidence in reported Louisiana cases of agents acting in an opportunistic way, this approach certainly opens the door to possible abuse. Holmes and Symeonides conclude that “uniqueness is not necessarily a vice; in this case, however, it may be of dubious merit.”²³¹

E. Conclusions

The story of the development of undisclosed agency law in Louisiana law is a unique and surprising one. The inaccurate translation of the mandate provisions of the Digest of 1808 may have caused confusion. Even though this was removed on revision of the Code in 1825, the Civil Code contained a *lacuna*, having failed to adopt the French *prête-nom*. It seems highly likely that undisclosed agency was already in place in Louisiana before the Supreme Court decided *Williams v. Winchester*. It is probable that it developed as a response to the form of international trade taking place in the early 19th century—that is, the way in which factors traded and the foreign principal rule. Indeed, as factors became lenders, the risks for principals increased, and this may have made undisclosed agency a practical necessity. If this is correct, the Supreme Court in *Williams v. Winchester* merely recognized, or legitimized, a practice already in existence. The alternative—that the Court transplanted an unknown rule from English law into Louisiana law, which then opened the door to a completely new way of trading using agents—seems unlikely. When the opportunity was taken to clear up the rather messy legal landscape, the Revision Committee did not simply adopt United States law—represented by the Restatement (Second) Agency. Rather, in certain respects, a unique approach was adopted, inspired in part by the law of another mixed legal system: Québec.

VII. UNDISCLOSED AND UNIDENTIFIED AGENCY IN SCOTS LAW

Building on the historical exploration of Scots law presented above in Part III, this Part focuses specifically on the development of agency law in

230. Reynolds, *supra* note 17.

231. Holmes & Symeonides, *supra* note 44, at 1144.

Scotland, in both the works of the Scottish Institutional writers and in the case law.

A. *Mandate*

Like Louisiana, the early law in Scotland applied a type of mandate received from Roman law. Erskine defined it as essentially gratuitous, “that contract by which one thus employs his friend to manage his affairs, or any branch of them.”²³² Stair’s analysis in *Institutions*, published in 1681, draws extensively on Roman law, both the Digest and the Institutes, and on Scottish case law. He draws contrasts: Scots law recognizes direct representation,²³³ whereas Roman law did not. He also contrasts Scots law with the civil law regarding the Scots’ attitude to delegation,²³⁴ and in the diligence that the mandatar—or agent—must show in the performance of the mandant’s—or principal’s—affairs.²³⁵ The influence of Roman mandate continues to the present day in the treatment of agency in Scots law as a *contract*.²³⁶ This emphasis is shared with Louisiana law and can be contrasted with English law where agency, although likely to be constituted by contract, need not be.²³⁷

B. *The Role of the Factor and Early Scottish Case Law*

Factors played a significant role in early Scottish trade, having wide powers and being entrusted with the possession and apparent ownership of goods.²³⁸ At that time, in common with his English counterpart, the factor “usually sells in his own name, without disclosing that of his

232. ERSKINE, INSTITUTE OF THE LAW OF SCOTLAND III,iii,31.

233. STAIR, INSTITUTIONS OF THE LAW OF SCOTLAND I,12,7.

234. *Id.*

235. *Id.* at I,12,10.

236. Judicial statements confirming that agency is a contract in Scots law include: *Graham & Co v. United Turkey Red Co.* 1922 SC 533; *Lothian v. Jenolite Ltd* 1969 SC 111; *Trans Barwil Agencies (UK) Ltd. v. John S Braid* 1988 SC 222; *Connolly v. Brown* [2006] CSOH 35, 2007 SLT 778; *Ben Cleuch Estates Ltd. v. Scottish Enterprise* [2006] CSOH 35, [2008] CSIH 1, 2008 SC 252.

237. WATTS & REYNOLDS, *supra* note 5, ¶ 1-006. Similarly, the California Civil Code 1873 does not classify agency as a contract. The agency provisions are not within Part 2 of the Code on “Contracts.” They are in Title 9, within “Obligations.” The author is grateful to Deborah DeMott for drawing this to her attention.

238. 1 GEORGE J. BELL, COMMENTARIES 476 (5th ed. 1826); ROBERT BELL, BELL’S DICTIONARY AND DIGEST OF THE LAW OF SCOTLAND 449–51 (George Watson ed., 1890).

principal and has implied authority to do so.”²³⁹ The factor was “generally the correspondent of a foreign house, or of a merchant or manufacturer at a distance from the place of sale.”²⁴⁰

Certain early Scottish cases appear to recognize the ability of an agent, acting in his own name, to acquire rights and duties for the principal which are directly enforceable against and by a third party. This is, in essence, a form of undisclosed agency. These cases occur from the late 17th and early 18th centuries onwards, predating the Union with England. They suggest that Scottish commercial law was an autonomous system of law, not yet significantly influenced by English law. The set of reports in which the cases appear is a compilation made from earlier reports; the reports are brief, sometimes amounting to little more than a short paragraph.²⁴¹ The factual circumstances of the transactions as described in these reports can be unclear. Nevertheless, the relevant case reports, discussed below, are not ambiguous and seem to confirm the existence of a native Scottish idea of undisclosed agency.

The first relevant case, *Sterly v. Spence*, decided in 1687, takes place in the context of bankruptcy, the context in which English undisclosed agency was born.²⁴² Although the parties to the action are not described as “agent” and “principal,” the facts involve the sale and purchase of goods in a representative capacity. The agent travelled to Holland to both sell and buy on behalf of a principal. The principal successfully claimed the goods in competition with the agent’s trustee in bankruptcy. A further example from the close of the 17th century is *Street v. Hume and Bruntfield*.²⁴³ A principal based in London sent skins for his Edinburgh factor to sell. The factor being “dead bankrupt,” the court held that the London principal had a direct action against the third party purchaser for declarator that the price of the goods was payable to the principal.²⁴⁴ Stair, discussing the case,

239. GEORGE J. BELL, *supra* note 238, at 477.

240. *Id.*

241. The set of reports is MORISON’S DICTIONARY, produced from 1801 onwards, and available on HeinOnline, as part of the Scottish Legal History Collection, under “Other Works,” and alphabetized under “D” for “Decisions.” The author has been unable to trace Session Papers (i.e., full copies of the case papers) for the cases in question, apart from *Milne v. Harris* (1803) Mor 8,493 (Scot.), Session Papers for which have been consulted.

242. *Sterly v. Spence* (1687) Mor 15,127 (Scot.).

243. *Street v. Hume & Bruntfield* (1669) Mor 15,122 (Scot.).

244. Although Stair, writing in 1681, and Erskine, writing in 1773, both note this case, it is not discussed by either of them in the context of undisclosed agency. The title “undisclosed agency” appears only in the 19th century in Scotland. See *infra* Part VII.C; STAIR, *supra* note 233, at 17; ERSKINE, *supra* note 232, at 34.

stated that the agent is not obliged to tell the third party that he is an agent.²⁴⁵ Rather, it is the duty of the third party to find out the identity of the party with whom he is contracting.²⁴⁶ Thus, Stair, the most important of the Scottish institutional writers, confirms the ability to act as an undisclosed agent.

Moving to the 18th century, in *Hay v. Hay*,²⁴⁷ a hidden principal appears to have defeated the agent's executor on the agent's death. The case may, however, be an example of *negotiorum gestio*—unauthorized management of an absent principal's estate.²⁴⁸

In *Milne v. Harris*, decided in 1803, the court found a purchaser entitled to a direct action against a seller, acting through a traveling agent.²⁴⁹ Although not an example of undisclosed agency, institutional writer Hume discusses this and the other cases before confirming the existence of undisclosed agency:

[A] mandatary is free, by our practice, to deal in the name of his constituent equally as his own; and if he do so—*nay, in some instances, though he have not done so*, he binds his constituent and acquires and bestows a claim on him equally as if the bargain were made by him in person.²⁵⁰

Scottish case law and institutional analysis predating the turn of the 19th century recognizes direct actions between third parties and undisclosed principals. If Müller-Freienfels is correct that, in English law, there “is no clear reported case of an undisclosed principal before the eighteenth century,”²⁵¹ then the Scottish cases are at least contemporaneous with the development of the undisclosed principal in English law. It seems unlikely that Scottish courts, seeing an English innovation, sought to import it. Rather, it seems more likely that the Scottish courts were responding to existing trading conditions and fashioning a solution. They would draw on the commercial practice of factors to do so. Many of those factors will have traded across the English-Scottish border. There is similarity to the

245. STAIR, *supra* note 233, at 17 (relying on *Howison v. Cockburn* (1665) Mor 11,604 (Scot.)).

246. *Id.* Stair's view on this point was affirmed by the Inner House in *Wester Moffat Colliery Co. Ltd. v. A Jeffrey & Co.* (1911) SC 346 (Scot.).

247. *Hay v. Hay* (1707) Mor 15,128 (Scot.).

248. The appellant bakers in the case certainly argued that the agent was a *gestor*. *Id.*

249. *Milne v. Harris* (1803) Mor 8,493 (Scot.).

250. BARON DAVID HUME'S LECTURES 1786-1822 160-61 (G.C.H. Paton ed., vol. 2, reprt. 1939-58) (emphasis added).

251. Müller-Freienfels, *The Undisclosed Principal*, *supra* note 41, at 302.

Louisiana experience in this respect. It is suggested that Scots law—and indeed Louisiana law—were responding to commercial pressures which arose from the nature of global trade, molding their laws in response. This situation in Scotland was temporary, however. Eventually, English precedents became available, and they were adopted in preference to the native Scottish legal concept, causing that native concept to virtually disappear.

C. The 19th Century and the Influence of Bell

The institutional writer George Joseph Bell played a crucial role in the development of modern commercial law in Scotland. He analyzes undisclosed agency in his book, *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence*.²⁵² He contrasted Scots law, which recognized non-gratuitous mandate, with the gratuitous mandate of Roman law, describing mandate in Scots law as “a more important and useful concept.”²⁵³ This book developed from a text focusing specifically on bankruptcy.²⁵⁴ This is, of course, the context in which undisclosed agency arose in English law. Bell confirms the principal’s right to claim his goods held by the factor on the factor’s bankruptcy. The case he discusses, although not named, is unmistakably *Sterly v. Spence*—the first case discussed in Part VII.B above.²⁵⁵ Referring to doubts on this point, he confirms that the principal can claim his goods even where the factor acted in his own name, provided that “the goods are fairly traceable to the commission given.”²⁵⁶ This last phrase is opaque, and the requirement imposed could have a number of meanings: that the goods are purchased by the factor within his authority, or the word ‘traceable’ may suggest that publicity of the fact of agency is required. Bell cites, and appears to follow, an English case: “I conceive the doctrine of the English law to be clear.”²⁵⁷ He notes the practice of purchasing in the factor’s own name in Russia, and interestingly also in “the cotton trade on the coast of America,” where

252. BELL, *supra* note 61. Bell’s other famous work, *PRINCIPLES OF THE LAW OF SCOTLAND*, does not refer to the undisclosed principal, although it notes the foreign principal rule, §§ 80–87 (citing *Burgess v. Bink & Co.*, July 2 1829, 7 S D 824 (4th ed. 1839)).

253. BELL, *supra* note 61, vol. 2, at 193.

254. BELL, *COMMENTARIES ON THE MUNICIPAL AND MERCANTILE LAW OF SCOTLAND CONSIDERED IN RELATION TO THE SUBJECT OF BANKRUPTCY*, vols. 1–2, (1800–04).

255. *Sterly v. Spence* (1687) Mor 15,127 (Scot.).

256. BELL, *supra* note 61, vol. 2 at 196.

257. *Id.* (citing *Ex Parte Chion*. Trinity 1721, 3 Peere Williams, 187 n.).

the legal result is unchanged.²⁵⁸ Further editions of *Commentaries* published during Bell's life continue to discuss undisclosed agency almost exclusively by reference to English authorities.²⁵⁹

From this point onwards, the Scottish judiciary relied on Bell's works, failing to cite earlier Scottish case law. Lord Justice-Clerk Boyle stated in 1836:

In a case such as this, I do not object to reference to the law of England, which rides over almost the whole of our mercantile law; but we have the law both of the English and Scotch cases on this point well expounded in Mr. Bell's work, who has seized the principles which run through those cases.²⁶⁰

As a comment on Bell's work, this is not correct: he did not refer to the early Scottish case law. By relying exclusively on Bell, the court imported English law. The Scottish bar—Faculty of Advocates—in contrast, continued to cite Scottish cases, perhaps as a mark of its independence.²⁶¹ The judiciary placed Scots law on an English course. The “war” was not entirely over, however. In 1860, a full bench decision of the Court of Session departed from Bell's view,²⁶² which reflected English law at the time, on the foreign principal rule.²⁶³ Progress continued towards assimilation with English undisclosed agency law. An Inner House case

258. *Id.* at 197.

259. BELL, *supra* note 61, vol. 1, at 399 (4th ed. 1821); BELL, *supra* note 61, vol. 2, at 323 (3rd ed. 1819).

260. *Stevenson v. Campbell* (1836) 14 S 562, 568 (Scot.) (the principal became disclosed during the course of dealing). *See Carsewell v. Scotts* (1839) 1 D 1215 (Scot.) (a further case involving an undisclosed principal, decided by the Inner House during this period).

261. *See, e.g., Stevenson v. Campbell* (1836) 14 S 562 (Scot.).

262. BELL, *supra* note 61, vol. 1, at 536 supports his contrary view with the English case, *De Gallion v. L'Aigle* 1 Bos and Pull 368, and, R. POTHIER, *CONTRAT DE MANDAT*, No 87, Vol 11, 188. Kenneth Reid has noted Bell's extensive use of Pothier's works. Kenneth G.C. Reid, *Introduction*, in GEORGE J. BELL, *PRINCIPLES OF THE LAW OF SCOTLAND* xx–xxi (Kenneth G.C. Reid ed., 4th ed. 1839).

263. *Millar v. Mitchell* (1860) 22 D 833 (Scot.). The early Scottish authorities had been unclear. *See Hunter v. Chalmers & Co.* (1766) Mor 14,199; *Brown v. McDougal*, November 30, 1802; *Burgess v. Bink and Co.*, July 2, 1829. Only in the final case is the agent not found liable. BELL, *supra* note 61, vol. 1, at 536 supports his contrary view with the English case of *De Gallion v. L'Aigle* 1 Bos and Pull 368, and R. POTHIER, *CONTRAT DE MANDAT*, No 87, Vol 11, 188.

from 1881 provided a working definition; the case was decided almost exclusively by reference to an English case.²⁶⁴ Lord Young stated:

[I]f a person really acting for another goes into the market and buys as if for himself, he binds himself, but if the party from whom he buys finds out his true position then he can treat him as an agent only. He cannot have two principals to deal with, and no double remedy is allowed.²⁶⁵

As far as the author can determine, the first judicial usage of the phrase “undisclosed principal” in Scotland occurred in 1847.²⁶⁶ By 1899, the phrase became the heading of a new section appearing for the first time in a posthumously published edition of Bell’s *Principles*.²⁶⁷ The 19th century ended, as has already been noted, with the passing of statutes on commercial topics for the United Kingdom as a whole, including bills of exchange, partnership, sale of goods, marine insurance, and, factors, or mercantile agents.²⁶⁸

D. Modern Scots Law

English law remains the main point of reference in Scottish cases on undisclosed agency in the modern law. It is usual to cite English precedents: indeed, it would be unusual not to do so. Courts refer to the classic English texts, and the author’s Scottish text on agency law, published in 2013.²⁶⁹

Differences between Scots and English law continue. In both Scots and English law, the third party, once aware of the existence of the principal, must elect to sue either the principal or the agent; she cannot sue both. Election, once made, is final.²⁷⁰ If she sues the agent and obtains a decree against that agent, but the agent has no funds, she cannot then sue the principal. The choice of the party to sue is therefore an important procedural step. In *Meier v. Küchenmeister*, decided in 1881, the Scottish

264. *Priestly v. Fernie* (1865) 159 Exch. Div. 820 (Eng.).

265. *Meier v. Küchenmeister* (1841) 8 R 642, 646 (Scot.).

266. *Smith v. Anderson & Co.* (1847) 9 D 702 (Scot.).

267. GEORGE J. BELL, *PRINCIPLES OF THE LAW OF SCOTLAND* § 224A (William Guthrie ed., 10th ed. 1899). *MacPhail & Son v. Maclean’s Trs.* (1887) 15 R 47 (Scot.) is cited in addition to two English ones.

268. See *supra* note 62 for the individual Acts passed; see also Rodger, *supra* note 62.

269. MACGREGOR, *supra* note 62.

270. *David Logan & Son Ltd. v. Schuldt* (1903) 10 SLT 598 (Scot.); *British Bata Shoe Co. Ltd. v. Double M. Shah Ltd.* (1980) SC 311 (Scot.).

Inner House was at pains to distinguish English law²⁷¹ on what amounted to election.²⁷² The court confirmed that nothing short of judgment against one party amounted to election. According to Lord Justice-Clerk Moncreiff: “But where the master has not been sued to judgment, or the action fails from some technical reason or another, the case is different. The fact of the pursuer having sued the wrong man will not bar him from suing the right one.”²⁷³

The court may have been aware of confusion in English law on this point. There are several English cases, including one decided in 1987, which state that raising an action, but not pursuing it to decree, amounts to an election.²⁷⁴ Scots law differs from English law, treating the third party more leniently: only unequivocal conduct on the part of the third party will amount to election.

Unidentified agency in Scots law was, until recently, unclear because of conflicting and ancient authority. The decision in *Ferrier v. Dodds*²⁷⁵ suggested that the third party can elect which of the agent or the principal, once disclosed, to hold liable. In the edition of Bell’s *Commentaries* published after this case was decided, the editor analyzed the law almost exclusively through discussion of English cases.²⁷⁶ He nevertheless left open the possibility that the agent is liable only conditionally in the event that he fails to name the principal.²⁷⁷ In *Lamont, Nisbet & Co. v. Hamilton*,²⁷⁸ Lord President Dunedin suggested that the correct approach was to ask on whose credit or financial reputation the third party relied on when concluding the contract.²⁷⁹ This reliance identifies to whom the third party is contractually bound. On the facts, the agent alone was bound. It appears that, in *Lamont*, *Ferrier* was cited to the court. There is no suggestion that both principal and agent were bound.

271. *Priestley v. Fernie* (1865) 159 Exch. Div. 820 (Eng.).

272. *Meier v. Küchenmeister* (1881) 8 R 642 (Scot.).

273. *Id.* at 645.

274. *Curtis v. Williamson* (1874) 10 QB 57 (Eng.); *United Austl. Ltd. v. Barclays Bank Ltd.* (1941) 1 AC 30 (Eng.), per Lord Atkin; *Clarkson Booker Ltd. v. Andjel* (1964) 2 QB 775 (Eng.) and *Chestertons v. Barone* (1987) 1 EGLR 15, 17 (Eng.), although doubt is cast on this line of authority in PETER WATTS & FRANCIS M.B. REYNOLDS, *BOWSTEAD AND REYNOLDS ON AGENCY*, ¶¶ 8–120, (21st ed. 2018).

275. *Ferrier v. Dodds* (1865) 3 M 561 (Scot.).

276. 1 GEORGE J. BELL, *COMMENTARIES* 540 (Lord McLaren ed., 7th ed. 1870).

277. *Id.*

278. *Lamont, Nisbett, & Co. v. Hamilton* (1907) SC 628 (Scot.).

279. *Id.* at 635.

The Scottish Inner House considered the issue in *Ruddy v. Monte Marco*.²⁸⁰ Qualified support was given to the credit or financial reputation approach. The first defender instructed the pursuer to carry out work on a casual basis. In the course of performing the work, Ruddy was injured. The question became which of the defenders had employed him. It was held that, in employing the pursuer, the first defender had acted as an agent for an unnamed—or unidentified—principal. The Inner House held that, in order to escape personal liability, the agent had to show that he expressly or impliedly negated personal liability.²⁸¹ There is an interesting similarity to Louisiana law here: one will recall that article 3018 of the Civil Code places a duty on the agent to name his principal, and, if he does so, he escapes liability. Before this case was decided, no such duty appeared to exist in Scots law. The Inner House innovated in Scots law.

The similar solutions to the problem of unidentified agency adopted by Louisiana law and Scots law have much to commend them. Each legal system provides the agent with an “escape route.” This represents a fair compromise between the interests of the various parties and promotes certainty, encouraging the agent to name the other party—the principal—potentially liable. The solutions are also logical. It makes sense that the *agent* is liable to the third party; the agent is the party known to the third party. Although there is a risk of opportunistic behavior on the part of the agent—i.e., leaving open who the principal will be—that risk is minimal given the incentive on the agent to name the principal. In both cases, the mixed legal systems did not follow the solutions offered by the common law. In the case of Louisiana, the Minutes of the Revision Committee suggest a civilian source. There is no reason to suspect a civilian influence on the Scottish court: rather, it fashioned its own solution.

VIII. COMPARATIVE REMARKS

Looking at the early law of both Louisiana and Scotland, there are similarities. Both rest on a contract of mandate, and the contractual nature of mandate and agency continues in the modern law. Both also recognize direct representation; although the Digest of 1808 failed to focus on representation, it existed before that term was introduced into the Civil Code in 1997.

Louisiana law and Scots law were subject to powerful common law influence at around the same time. The Louisiana Purchase in 1803 opened the gates to immigrants from other states and an influx of common

280. *Ruddy v. Monte Marco* (2008) CSIH 47 (Scot.).

281. *Id.* at 23.

lawyers.²⁸² The following year, 1804, marked the first publication in Scotland of Bell's *Commentaries*, the book which acted in undisclosed agency as a conduit for English influence. Despite this similarity, the conditions in each country were very different. The Louisiana population reacted against the prospect of imposition of the common law.²⁸³ A Digest—or Civil Code—was enacted in 1808; Louisiana did not adopt the common law. Crucially, the draft Commercial Code, the “mammoth undertaking that somehow missed its mark,”²⁸⁴ was not enacted. This would have entrenched the civilian tradition in commercial law matters. By contrast, there was no such radical clash of cultures between Scotland and England. In the early years of the 19th century, assimilation with English commercial law had begun in Scotland. At this stage, there is no evidence of assimilation in Louisiana if one considers the terms of the Civil Code and reported cases; however, assimilation may have been taking place on the ground due to commercial pressures.

Turning to the role of the courts in each jurisdiction, judicial reception of the undisclosed principal in Louisiana was a painful and controversial process. Successive revolts against the importation of the common law took place in 1947, 1983, and even as recently as 1992. These revolts may be agency-specific examples of the wider civilian renaissance which took place in the second half of the 20th century in Louisiana.²⁸⁵ In 1992, the Supreme Court in *Woodlawn* expressed the clear desire to assimilate with commercial law in the other states of the Union. Scots law moved, by contrast, effortlessly towards adoption of English precedents, even where Scottish precedents were available. Vernon Palmer characterized the adoption by a mixed legal system of the common law as “a matter of choice, not compulsion.”²⁸⁶ In the context of undisclosed agency, this may be an example of “willing assimilation” by the courts.²⁸⁷ This can be seen if we compare two judicial statements in agency cases—although admittedly they are not contemporaneous.

First, there is Justice Lemmon in the Louisiana Supreme Court: “In matters of commercial law, Louisiana has frequently taken steps to make our law uniform with other states.”²⁸⁸ Second, there is the dictum of Lord Justice-Clerk Boyle in the Scottish Inner House, already quoted:

282. DARGO, *supra* note 186, at xxi, 32.

283. Yiannopoulos, *supra* note 156.

284. Nathan, Jr., *supra* note 55, at 52.

285. PALMER, *supra* note 19, at 41.

286. *Id.* at 81.

287. *Id.*

288. *Woodlawn Park Ltd. v. Doster Constr. Co.*, 602 So. 2d 1029 (La. Ct. App. 1992), *rev'd*, 623 So. 2d 645, 648 (La. 1993) (citations omitted).

In a case such as this, I do not object to reference to the law of England, which rides over almost the whole of our mercantile law; but we have the law both of the English and Scotch cases on this point expounded in Mr Bell's work, who has seized the principles which run through those cases.²⁸⁹

These are strong expressions of the attractions of common law jurisprudence. The common law offered an organized legal regime, in contrast with the disordered Scottish case law. In Scotland and Louisiana, there is likely to have been a strong desire to develop a single legal regime for a single market—extending to more than one nation, in the case of Scotland, and to more than one State, in the case of Louisiana. The courts in both systems are prime movers in the process of assimilation with the common law.

Finally, consider the general role of the treatise writers in the development of undisclosed agency and agency law. The transformative influence in Scots law is Bell's published works. In Louisiana law, the Louisiana Supreme Court relied on the work of Livermore, a local attorney and treatise writer. This Article has uncovered a Scottish–United States connection in agency law generally. This is the fact that Bell relied on the works of Kent and Story, and Kent and Story relied, in turn, on the works of Bell. The following paragraphs interrogate the reasons why these authors found each other's work to be useful.

Looking at the works of Bell, in *Commentaries*, if we compare the third edition—published in 1810—with the fourth edition—published in 1821—the fourth contains a significantly greater number of references to the civil law in the discussion of mandate, principally Pothier, but also Italian and Dutch writers.²⁹⁰ These sources are not referred to where undisclosed agency is discussed: this is not surprising given the lack of undisclosed agency in the civil law.²⁹¹ In the last edition of *Principles* published during Bell's lifetime—1839²⁹²—in which mandate is

289. *Stevenson v. Campbell* (1836) 14 S 562 (Scot.) (the principal became disclosed during the course of dealing). *See Carsewell v. Scotts* (1839) 1 D 1215 (Scot.) (a case involving an undisclosed principal, decided by the Inner House during this period).

290. *See, e.g.,* GEORGE J. BELL, COMMENTARIES 389–90 (referring extensively to CASAREGIS, DISCURSUS LEGALES DE COMMERCIO and GEORGE J. BELL, COMMENTARIES 395–96, with extensive reference to POTHIER, POTHIER, TRAITE DU CONT DE MANDAT).

291. GEORGE J. BELL, COMMENTARIES 477 (5th ed. 1826).

292. GEORGE J. BELL, PRINCIPLES OF THE LAW OF SCOTLAND (4th ed. 1839).

discussed,²⁹³ the same civilian authors are cited and, in addition, Kent and Story.²⁹⁴ By 1839, Bell had clearly become aware of and had started to use the works of U.S. authors in addition to civilian ones. Kenneth Reid has noted the frequent appearance of references to Kent and Story's works in this edition.²⁹⁵ Reid's specific focus was not agency law, and the examples he gives are not drawn from agency law.

Turning to the U.S. authors, Story promised, in the long title of his book, "occasional illustrations from the civil and foreign law." He refers to the law in Continental Europe, including within that description Scots law, specifically Bell.²⁹⁶ Reid suggests that Kent cited Bell extensively, and Story cited Bell occasionally.²⁹⁷ U.S. courts referred to Bell's work with surprising frequency at the time.²⁹⁸ By contrast, Bell's work does not seem to have been influential in England.²⁹⁹

In an article published in 1959, Kurt Nadelmann reproduced a letter from Story to Bell, written in very warm terms, acknowledging receipt of a copy of the 4th edition of *Principles*.³⁰⁰ This letter contains a passage which perhaps illustrates Story's views on comparative law. He hoped:

[T]he mutual studies of the jurisprudence of other countries will at no distant time lead the way to vast improvements in the science, and will gradually obliterate the anomalies and peculiarities of each, at least in all those cases, where the same principles and the same interests ought to lead to the same general results, for the benefit of

293. *Id.* at Part I.2 §§ 80–87.

294. JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW 101 (1832); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 568 (1826–30).

295. BELL, *supra* note 292; Reid, *supra* note 262, at xxii; Kenneth G.C. Reid, *From Text-Book to Book of Authority: the Principles of George Joseph Bell*, 15 EDIN. L. REV. 6 (2011).

296. BELL, *supra* note 292 (citing BELL, COMMENTARIES, § 398, 418 (4th ed. 1821)).

297. Reid, *supra* note 262, at xxii.

298. Although C. Paul Rogers, III identified 14 references, Richard H. Helmholz suggested that it was closer to 200. C. Paul Rogers, III, *Scots Law in Post-Revolutionary and Nineteenth-Century America: The Neglected Jurisprudence*, 8 LAW & HIST. REV. 205 (1990); Richard H. Helmholz, *Scots Law in the New World: Its Place in the Formative Era of American Law*, in HECTOR L. MACQUEEN, MISCELLANY FIVE, 52 STAIR SOC'Y 169, 175 (2006).

299. Reid, *supra* note 262, at xxii.

300. The letter is dated June 8, 1839. Kurt H. Nadelman, *Joseph Story and George Joseph Bell*, JUR. REV. 31 (1959).

commerce and the intercourse of nations.³⁰¹

The eventual picture is a complex one. Scots law is used by the American treatise-writers as an example of the civil law, despite its mixed nature. The growth of undisclosed agency is roughly contemporaneous with Bell's use of the works of American authors. His use of American works may have bolstered his adherence to the common law tradition in his treatment of agency.

Others have explored the exchange of views between United States and Scottish legal authors in the 19th century, venturing reasons why it took place.³⁰² This author would suggest, as a likely reason, the massive migration from Scotland to the United States taking place at this time,³⁰³ as landowners in the Scottish Highlands cleared their lands of people for more profitable sheep-rearing.³⁰⁴ Granted, the majority of emigrants are unlikely to have come from the social class from which Scotland's lawyers were drawn.³⁰⁵ Bell lived in Edinburgh—specifically, in Fountainbridge (close to the current author's home). Though this is far from the Highlands, Bell was undoubtedly aware of these controversial events. The fact that such a large part of the Scottish population was emigrating to the United States could have bolstered Bell's already-existing interest in the works of U.S. authors. Kent and Story, in turn, could have been drawn to Bell's focus on bankruptcy. Richard Helmholz suggested that when citing foreign law, U.S. authors tended to refer to modern rather than ancient works.³⁰⁶ Bell's works on bankruptcy could have been particularly useful at a time of huge economic growth in the United States. Finally, England may have been identified as the "enemy" at this time, rather than Great Britain, bearing in mind the events of the War of 1812. As a result, Scottish sources could have been more attractive to U.S. authors than English ones.

CONCLUSION

This Article has suggested a reexamination of our traditional characterization of undisclosed agency as a creation of the common law. Louisiana law and Scots law may have developed undisclosed agency as a practical necessity, in response to pressures exerted by international

301. *Id.* at 39.

302. Rogers, III, *supra* note 298; Helmholz, *supra* note 298.

303. Helmholz, *supra* note 298, at 170.

304. For analysis of the "Clearances," see J. HUNTER, *THE MAKING OF THE CROFTING COMMUNITY* (1976, rept. 1995).

305. Rogers, III, *supra* note 298.

306. Helmholz, *supra* note 298, at 179.

trade. It may be no coincidence that both legal systems were, in the early 19th century, involved extensively in international trade, including trading across the border with the common law neighbor. It seems unlikely that courts introduced it to either legal system as a legal transplant, effectively paving the way for a new way of trading using agents. This conclusion is important: it may be incorrect to continue to characterize undisclosed agency as the most important difference between the common law and the civil law in the context of agency law. Perhaps every legal system reaches towards an escape route from the confines of privity of contract when agents are used.

In many ways, the comparison carried out in this Article tests, in an agency context, assumptions about the way mixed legal systems develop or behave. The first assumption is that, in commercial law matters, mixed legal systems assimilate entirely with the common law. The essential contention of this Article is that undisclosed agency developed in Louisiana law and Scots law in practice, and that the concepts are not legal transplants. Nevertheless, there is evidence of extensive assimilation, particularly in Scotland where a nascent Scottish concept is eventually replaced by an English one. Assimilation is not complete, however; certain parts of the law continue to be different. As for the speed of assimilation, those who have characterized it as gradual are correct in this particular context.³⁰⁷

The second assumption this Article tested is that mixed legal systems contain legal rules that are examples of fusion between the civil law and the common law.³⁰⁸ In both countries, agency law as a whole is an example of fusion: the civilian basis of mandate is fused, or suffused, with the common law. The unique solutions developed by Louisiana and Scots law to unidentified agency are less obviously examples of fusion. In the case of Louisiana, the Revision Committee created the new approach, and in the case of Scotland, the Court of Session. In this context, the author does not agree with Holmes and Symeonides that a unique solution is necessarily a bad thing: these solutions have much to commend them.

The third assumption tested is the idea that mixed legal systems can choose the best rule from either the civilian or common law tradition.³⁰⁹

307. “[C]ommercial law will not remain civilian, but in due time gravitates toward the law of the dominant surrounding economy or major trading partners.” PALMER, *supra* note 19, at 27.

308. *Id.* at 91.

309. See THE CONTRIBUTION OF MIXED LEGAL SYSTEMS TO EUROPEAN PRIVATE LAW 10 (Jan Smiths ed., 2001). According to Jacques Du Plessis the conditions of reception are not always conducive to selection of the best rule by the judiciary. Jacques Du Plessis, *The Promises and Pitfalls of Mixed Legal*

There is little evidence of this phenomenon taking place in this agency context. Almost all of the comparative material before the Revision Committee was civilian in nature: there is no evidence in the Minutes of consideration of different common law approaches. There appears to have been no “weighing” of the solutions offered by the two different traditions. Interestingly, it was the law of another mixed legal system, Québec, which was the major point of reference for the Revision Committee. In Scots law, there is no evidence that the courts considered the solutions offered by the different legal traditions. This would, of course, be a difficult task in the context of deciding a case: the court would have to rely on counsel to cite the law of other legal systems. The Louisiana experience illustrates that revision of a Code can set a legal system on a different course. The only similar opportunity Scots law might have would be a law reform project carried out by the Scottish Law Commission (“SLC”). If the SLC considers agency law, Scots law could certainly learn from Louisiana law.³¹⁰

Returning to the question posed at the beginning of this Article, is a civil code “tough law,”³¹¹ acting to slow down or impede common law influence that would dilute the civil law? To answer this question in the agency context, compare the process of assimilation towards the common law in the codified system, Louisiana, to that of the uncoded system, Scotland. The Louisiana Civil Code does not seem to have had that effect in this context. The existence of provisions in the Digest of 1808 inimical to undisclosed agency did not impede its recognition by the Louisiana Supreme Court. Revision of the Code was painfully slow to arrive. In the uncoded system of Scotland, widespread use of English case law resulted in the virtual replacement of a nascent Scottish concept with an English one. Given that both mixed legal systems moved towards the common law, codification does not appear to have entrenched the civil law in the manner that Palmer has suggested.

Just how long Louisiana law and Scots law will continue to differ remains to be seen. Scotland faces an uncertain future, as the United Kingdom leaves the European Union (“E.U.”). Given that the majority of

Systems: The South African and Scottish Experiences, 9 STELL. L. REV. 338, 343 (1998); Du Plessis, *supra* note 38, at 505–06.

310. Wolfram Müller-Freienfels suggested that Louisiana law could be used in this way: “The manner in which Louisiana has combined much of the best from the European and Anglo-American systems and has created indigenous institutions makes it clear that any reforms proposed and adopted by Louisiana will be of special interest for both the civil-law and the common-law world.” Müller-Freienfels, *supra* note 13, at 77–78.

311. PALMER, *supra* note 19, at 6.

Scots voted against leaving the E.U., the United Kingdom's exit may trigger a second Referendum on Scottish independence from the United Kingdom; Scotland's political future will shape its law. If, as seems likely, it remains within the United Kingdom and leaves Europe, the dominant influence on Scots law is likely to be English law. If a further Referendum is triggered, and Scotland leaves the United Kingdom seeking reentry to the E.U., the dominant influence could well be European law. The author certainly hopes that the future for Louisiana law is, in contrast, more stable.